INDEX.

	PAGE
General Statement of Case	1-3
PART I: ON PLEA IN BAR ONLY	4-109
Statement of Facts for Part I	5-18
Indictment	6
Statutes	7
Plea in Bar	8
Immunity Statute	9
Replication	10
The Issue	12
Special Trial	13
Testimony given at Anti-Trust Inquiry	13
Question of Relevancy of Testimony to subject-matter of Indictment	14
Evidence of Relevancy	15
Pleadings	15
Decision of Court of Appeals	16
Other Evidence	18
Errors, Exceptions, &c.	19
Outline of Argument	21
Point I: Immunity Statute a Grant of Amnesty	24
(1) Distinction between an Amnesty Statute and the Constitutional Privilege	25

PAGE

(2) Language of Statute itself, its History and Evolution show it to be a Statute of Amnesty..... 30
The adversary view..... 35
The proviso excepting perjury... 36
An Amnesty statute operates as a Pardon 36-7
The Statute a "substitute" for the Constitutional Privilege only as a shield to witnesses against self-incrimination, *not* in its after effect as immunity..... 37-9
(3) Impossibility of applying Conditions Precedent belonging to the Privilege to the Statute..... 40
(4) Public policy of Statute shows it should operate as a Pardon.... 41
(5) Authorities on the Point..... 45

Point II: The Amnesty or Pardon theory refutes 51

(1) Every argument of the Government 52
(2) Every ground, save one, assigned by Trial Court for its Opinion.... 54-6
(3) Every ground given for opinion of Court of Appeals..... 56
(4) All authorities cited in said opinions and by our adversaries..... 58
(a) *The Leading Cases Collated and shown to favor our contention...* 63-73

PAGE

Point III: *Petitioner's former testimony was "concerning the transaction, matter or thing," on account of which he is now prosecuted* 73

(1) Lower Court's Findings on Question 75
(2) Liberal construction required by authority 77-86
(3) Liberal construction required by Public Policy..... 86
(4) Relevancy not denied by Pleadings 15, 90

Point IV: *Error of Court of Appeals in holding Petitioner not entitled to personal immunity because he testified as Officer of Corporation under investigation*..... 91

The rule in *Henkel* and *Wilson* cases distinguished 98-100
The *Baird Case* the only one in point.... 101

Point V: Adversary Brief criticised..... 102

PART II: ON GENERAL ISSUE..... 110

Statement of Facts for Part II.....111-139

Revenue Statutes..... 113
Duties of Secretary..... 116
Table of Profits of Several Refineries. 120
Chief Fiscal Officer..... 123
Overseer of Refineries..... 125
System of Bookkeeping..... 126
Differences in Weight..... 127
Liberal Custom House Weights..... 128
Untechnical Explanation..... 129

PAGE.

Loss of Weight in Voyage..... 130
Witherspoon letter..... 132
Import duty..... 133
Refunds of Duty..... 133-4
Turner letter..... 134
The Non-Interference Period..... 136
Stranahan Conference..... 138
Motive 139

Point VI: Error in denying separate trial. 140

Point VII: Not guilty of Conspiracy if not guilty of offence itself..... 147

Point VIII: No evidence justifying Inference of either Participation or Knowledge 152

Point IX: Error in admitting "Pink Books" 155

Point X: Error in admitting Spitzer's testimony 160

INDEX OF CASES.

PAGE.

Am. Lithograph *v.* Werckmeister, 221 U. S. 603 ..... 67, 85, 101
Am. Tobacco *v.* Werckmeister, 207 U. S. 293 ..... 50, 86
Angell *ats* U. S., 11 F. R. 34, 43..... 160
Armour *ats* U. S., 142 F. R. 808.....43, 70, 90
B. & O. *v.* I. C. C., 221 U. S. 622-3.....16, 100
Baird *ats* I. C. C., 194 U. S. 25..... 30, 99
Boyd *v.* U. S., 116 U. S. 616..... 83
Bromwich *ats* People, 200 N. Y. 385..... 160
Brown *v.* U. S., 150 U. S. 93..... 162
Brown *v.* Walker, 161 U. S. 591.....39, 44, 45, 50, 64, 66, 79, 80, 81, 82, 83, 89, 90, 98, 103
Burr *ats* U. S., 25 Fed. Cas. 39-40..... 58, 81
Burrell *v.* Montana, 194 U. S. 572.....47, 66, 103
Chicago Lumber *v.* Hewitt, 64 F. R. 314... 156
Chaffee *v.* U. S., 18 Wall. 516..... 159
Collins *ats* U. S., 25 Fed. Cas. 550..... 89
Counselman *v.* Hitchcock, 142 U. S. 527... 32, 38, 63, 66, 80, 82, 84
Crofford *ats* State, 121 Iowa 395..... 163
Desroche *ats* State, 47 La. Ann. 651..... 147
Emery's Case, 107 Mass. 172, 182..... 69
Foote *v.* Buchanan, 113 F. R. 156..... 68
Forbes *ats* People, 143 N. Y. 219..... 85
Foster *v.* Neilson, 2 Pet. 253..... 87
Gould *v.* Hartley, 187 Mass. 561..... 158
Goodrade *ats*, 132 Mich. 542..... 160
Hale *v.* Henkel, 201 U. S. 43....47, 67, 82, 98, 101
Head Money Cases, 112 U. S. 598..... 87
Heike *v.* U. S., 217 U. S. 423.....6, 13, 37
Ex. p. Irvine, 74 F. R. 954..... 60

PAGE.

Irwin *ats.* People, 97 Cal. 494..... 164
Jack *v.* Kansas, 199 U. S. 372..... 66
Kent *v.* Garvin, 1 Gray, 148..... 157
Kimball *ats.* U. S., 117 F. R. 156..... 35, 61
Kirby *v.* U. S., 174 U. S. 47..... 160
Klein *ats.* U. S., 80 U. S. 128..... 106
Knote *ats.* U. S., 95 U. S. 149..... 106
Krause *v.* U. S., 147 U. S. 44.....145, 146
Logan *v.* U. S., 144 U. S. 263..... 162
Luther *v.* Borden, 7 How, 42..... 87
Matthews *ats.* U. S., Fed. Cas. No. 15741 C. 145
Mitchell *ats.* People, 94 Cal. 550..... 159
Moberly *ats.* State, 121 Mo. 604..... 164
Morron *ats.* State, 14 Lea. 483..... 146
Motes *ats.* U. S., 178 U. S. 458..... 160
Murphy *ats.* State, 128 Wis. 221.....35, 49, 70
Norwalk *v.* Ireland, 68 Conn. 1..... 158
Nowell *ats* State, 58 N. H. 314..... 98
Penn. *v.* Wheeling, 12 Pet. 737-8..... 86
Price *v.* Standard, 90 Minn. 264..... 159
Price *ats.* U. S., 96 F. R. 960, 962..... 47, 60
O'Connell *v.* Penn, 118 F. R. 991..... 146
Oxendine *ats.* State, 107 N. C. 783..... 143
Rauscher *ats.* U. S., 119 U. S. 418-9..... 87
R. I. *v.* Mass, 12 Pet. 737-8..... 86
Stephen's Pleading, 233-5..... 6
Swan *v.* Thurman, 112 Mich, 416..... 158
Swift *ats* U. S., 186 F. R. 1002..... 48, 70
Thomas *ats.* State, 64 N. C. 72..... 160
Train *v.* Taylor, 51 Hun, 215..... 162
White *ats.* People, 81 Ill. 338..... 143
Williams *v.* Dickinson, 28 Fla. 90..... 103
Williams *v.* Suffolk, 13 Pet. 420..... 87
Wilson *ats.* People, 94 Ill. 299..... 164
Wilson *ats.* U. S., 221 U. S. 361.....16, 30, 57, 99

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 520.

CHARLES R. HEIKE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONERS.

Statement of the Case.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted herein February 23rd, 1912 (Record p. 1667), to review a judgment of said Court of Appeals, entered therein October 20th 1911 (Do., p. 1662), affirming a final judgment of the Circuit Court of the United States for the Southern District of New York of conviction upon a verdict, entered therein September 19th 1910 (Do., pp. 1367, 1373, fols. 91, 94); and incidentally bringing up for review, as necessary to the rendition of, and included in, said

final judgment, a prior interlocutory judgment of said Circuit Court upon a directed verdict, overruling defendant's, now Petitioner's, special plea in bar, entered therein February 14th 1910 (Do., fols. 89, 817-8).

The Petitioner now seeks of this Court the same relief he prayed in his writ of error to said Circuit Court of Appeals (Record pp. 2-3) and in his assignment of errors therein (Do., pp. 1378-1449), and which was denied by said judgment of affirmance of October 11th 1911 (Do., p. 1662, fol. 4988), to wit: first, the reversal of the said interlocutory judgment of February 14th 1910, overruling said plea in bar with leave to plead over (Do., fol. 89), which said plea is of the so called Immunity Statute, Act of Feb. 25, 1903, Ch. 755, §1 (Do., pp. 35-4), and, if allowed, will afford a complete defence to the further prosecution of the indictment; and secondly, the reversal of said judgment of conviction of September 19th 1910, the Petitioners, as defendant aforesaid having pleaded over, "not guilty" (Do., fols. 90, 91, 94, 4099, 4118).

And if said judgment be reversed on the ground that said plea in bar should have been sustained, Petitioner asks that this cause be remanded to said Circuit Court with instructions to enter a final judgment therein dismissing the indictment herein; but if said plea be still held bad, and said judgment below be reversed for error on the trial of the general issue, then Petitioner asks that a new trial be awarded herein.

Accordingly the argument naturally divides itself into two parts: first, concerning the errors of the lower courts on the trial of the issues raised by said plea in bar (Trial, Record, pp. 57-275;

5th, 6th and 7th grounds of Motion in Arrest of Judgment and exception, Record, p. 1371-2; Assignment of Errors, Nos. 1-20, and especially subdivisions 5, 6 and 7 of Error No. 93, Record, pp. 1378-1389, 1448); and Second Part, all other errors committed on the trial of the issues raised by the plea of not guilty (Trial, Record, pp. 340-1344; Requests to Charge, pp. 1345-1360; Assignment of Errors, Nos. 21-95, pp. 1390-1449). Although the motion in arrest of judgment and the 93rd error assigned (Record, fols. 4112-4, 4343-4) incorporated those technical errors on the plea in bar, and the benefits of exception thereto (Do., fols. 816-7), into the errors and exceptions arising upon the trial of the general issue, so that they are reviewable here together, yet we shall treat this Part I of our brief, questions arising upon the special plea in bar and concerning the immunity statute, by itself first, leaving all other questions, except that of immunity, and the merits of the case to Part II.

PART I.

ON THE PLEA OF IMMUNITY ONLY.

Statement of Facts of the Case on the Plea in Bar.

This is the second time this case has been before this Court on the special plea in bar. On the former occasion a writ of error to review directly the said interlocutory judgment overruling the plea was dismissed for lack of finality only. In doing so the Court, per Mr. Justice Day, gave this summary of facts up to that date:

"The plaintiff in error, Charles R. Heike, was indicted with others on January 14, 1910, for alleged violations of the customs laws of the United States in connection with the fraudulent importation of sugar, and also for conspiracy under §5440 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3676), to defraud the United States of its revenues. Heike appeared and filed a special plea in bar, claiming immunity from prosecution under the act of February 25, 1903 (32 Stat. at L. 1904, chap. 755, U. S. Comp. Stat. Supp. 1909, p. 1142), as amended June 30, 1906 (34 Stat. at L. 798, chap. 3920, U. S. Comp. Stat. Supp. 1909, p. 1168). The plea set up in substance that Heike had been called upon to testify before the grand jury in matters concerning the prosecution against him, and had thereby become immune from prosecution under the law. The government filed a replication, taking issue upon the matters set up in the plea. The issues thus raised were brought to trial before a jury in the circuit court of the United States for the Southern District of New York, and at the conclusion of the testimony, the government and the defendant each moved for direction of a verdict, and the court thereupon instructed the jury to find the issues joined in favor of the government. Upon application by Heike, he was granted the privilege of pleading over, and he thereupon entered a plea of not guilty, and the case was set for trial on March 1, 1910. No judgment having

been entered in the case, mandamus proceedings were brought in this court, and in pursuance of its order a judgment *nunc pro tunc* was entered as of February 14, 1910, as follows: 'Judgment be and is hereby entered for the United States upon the verdict, with leave to the defendant to plead over.' "

Heike *v.* U. S., 217 U. S., 423, 426-7.

The Indictment (1 Record, pp. 5-28) is divided into six counts. *The first four counts* charge defendants, the petitioner and five others, with fraudulent importation of dutiable sugar in violation of the United States revenue law (Do., pp. 5-18)—to wit, that defendants "did unlawfully and knowingly make and effect and aid in effecting fraudulent entries of imported goods, and by means of said entries, and of the fraudulent and false papers and statements by which they were effectuated, the United States was caused to and did liquidate, collect and accept certain duties upon said entries at an amount much less than the true duties thereon" (Do. fols. 21-2, 26-7)—the specific offence being the well known "sugar-weighing frauds" of 1907 committed at the docks of the American Sugar Refining Company in Brooklyn, New York. The 5th and 6th counts charge a *conspiracy* to commit these same revenue frauds; the 5th count charging a conspiracy "to defraud the United States" (Do., pp. 18-26), the 6th count a conspiracy "to commit an offence against the United States", (Do., pp. 26-8), following the language used in defining the two kinds of criminal conspiracy forbidden by Section 5440 of the Revised Statutes. We may here anticipate by saying that on the trial of the general issue herein the Petitioner, as defendant afore-

said, was acquitted on the first five counts, convicted on the *6th count only*—conspiracy to commit the "sugar weighing frauds" (Record fols. 91, 4099).

The Statutes—alleged to have been violated are § 5445 of the Revised Statutes and Sec. 9, Ch. 407, 26 S. L., the Customs Administrative Act of June 10, 1890, (Endorsement on Indictment, 1 Record fol. 84), to wit:

"Sec. 5445. Every person who, by any means whatever, knowingly effects, or aids in effecting any entry of any goods, wares, or merchandise at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined not more than five thousand dollars, or be imprisoned not more than two years, or both."

"Sec. 9. That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement written or verbal or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and

such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

And the criminal conspiracy statute:

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

The Plea in Bar of the Immunity Statute, the Replication and Rejoinder, are printed in Record, pp. 35-56. The substance of the plea was that Petitioner, then defendant, answering the Government's subpoena, (subpoenas printed at length, Do., pp. 43-7), had testified and produced evidence, documentary and otherwise, on two different occasions, once in June 1909, and once in December, 1909, and by a supplementary plea (Do., pp. 54-6), on a third occasion in January, 1910, before a Federal Grand Jury, investigating alleged monopolies and contracts in restraint of trade under the Sherman Anti-Trust Act, on two or three previous occasions, and that the testimony he then gave, and the documents he then produced, concerned the subject-matter of the present indictment; that is, the sugar-weighing frauds of 1907, aforesaid, were connected with and concerned in the discovery made by him at former inquests of the Grand Jury under the Sherman Act, and therefore he had been indicted for or on

account of a "transaction, matter or thing concerning which" he had testified and had produced documentary evidence at said inquests under the Sherman Act; and that he was immune from prosecution therefor under the Act of Feb. 11, 1893 (3 U. S. Compiled Stat., 3172), as extended by the appropriation Acts of February 25, 1903, March 4, 1907, May 27, 1908, and March 4, 1909, now reading:

Immunity Statute. Act. Feb. 25, 1903, c. 755, sec. 1:

"Appropriation for enforcement of anti-trust and interstate commerce laws; exemptions from prosecutions of persons giving testimony; prosecutions for perjury in giving testimony.

"That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February 4th, 1887, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2nd, 1890, and all Acts amendatory thereof or supplemental thereto, and sections 73 74 75 and 76 of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August 27th, 1894, the sum of $500,000., to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the courts of the United States; Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts:

Provided, further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The Replication, strictly speaking, does not plead either by way of traverse or confession and avoidance; it does not traverse because it raises a new issue; it does not confess because it denies; it is a sort of qualified traverse introducing new matter. That is, the plaintiff does not absolutely deny the plea; he denies the effect of it *only* because of the counter-effect of his new matter; so that if the new matter fail of its counter-effect, either from disproof or incompetency, the facts of the plea stand admitted of record.

1 Chitty on Pleading, 601.
Stephen on Pleading, 233-5.

It may be that this replication should be treated merely as a pleading of confession and avoidance—that is, confessing the facts of the plea but avoiding their effect by new matter—notwithstanding the form used. It seems that a replication, denying the effect of a plea, and introducing new matter without confessing, occurred but seldom in the old practice except in actions in debt on a bond conditioned to perform covenants, &c., when the plaintiff inserted the particular breaches complained of in the replication, instead of stating them in the declaration.

1 Chitty Pl., 585-7.

At any rate, the denial in the first paragraph of the replication is not a flat denial of the plea, that is of the facts of the immunity pleaded, but a denial that the plea is good *because* of the countervailing matter set up in the remaining

paragraphs of the replication. And inasmuch as said new matter utterly fails to avoid the effect of said plea in bar, we claim that the facts of the latter stand uncontradicted, and that the issue thereon should have been decided in Petitioner's favor (*post* Point III). The plea states three essential facts: That Petitioner was subpœnaed by the Government as a witness in a proceeding under the Sherman Act; that he attended and gave oral and documentary evidence; and that the evidence concerned the transaction, matter or thing on account of which he has been indicted. These three facts being true, the Government is barred by the statute from further prosecution hereof. The replication denies, not the facts stated in the plea, but the deduction of immunity therefrom, because of the new facts and reasons then set forth (Record, p. 48).

The new matters with which the Government seeks to avoid the plea of immunity are: 1st, that the proceeding in which Petitioner testified was different from that in which he was indicted, the investigations of June and December, 1909, being both for violations of the Sherman Act, and this indictment being for violation of the Customs Law (Do, fols. 144-150); 2d, that the District Attorney had no personal knowledge of said petitioner's said testimony (Do, fols. 150-1); 3d, that the facts to which Petitioner testified formed no part of the crime that constitutes the subject matter of this indictment (Do, fol. 150). So far the replication has not denied any of the essential facts, the subpœna, the testimony or the relation of the testimony to the indictment; it has relied upon the additional fact that the indictment was found in

a different proceeding and by a different grand jury than that in which Petitioner testified, on the theory that the immunity which a witness gets by testifying, in compliance with the statute, in a Grand Jury investigation under the Sherman Act, extends only to an indictment by that same grand jury and for violations only of that same Sherman Act. Lastly, the replication sets up that Petitioner, defendant therein, was called as a witness in February, 1909, "in a proceeding brought by the United States against the American Sugar Refining Company of New York, *involving the very frauds here in question*, and testified at length as to the transactions, matters and things which are the subject of this indictment" (Do., fol. 153). The substance of the whole reply is, that while Petitioner did testify as he says in his plea, yet the plea is not a good bar, (1) because the proceedings in which he testified and in which he was indicted were different; (2) because the crimes investigated were different, (3) and because he did not put in a claim, before he gave his testimony, that the testimony he was about to give would incriminate him, that is, did not claim "any privilege with respect thereto" (Record, fol. 153) —that is, because he did not plead immunity before he got it.

The issue on the plea in bar is that joined by the plea and replication.

Stephen on Pleading, 58-9.

And as to that issue, we claim, *first*, that the essential facts of the plea are not traversed, and that the new matter set up in reply are insufficient in law to avoid or destroy the effect of said

plea (*post* Point III); and *second*, that all the facts necessary to sustain the plea in bar, assuming they are traversed, were proved at the special trial as follows.

The Special Trial is reported, 1 Record, pp. 57-275; Exhibits, pp. 276-339. The Petitioner first proved the service on him by the Government of the subpoenas annexed to the plea (Record, pp. 43-7; fols. 259-260, 272-3, 291-2; Exhibits 2, 6, 16; pp. 289, 290, 314). This first step in the acquisition of immunity was made necessary by the amendatory act of June 30, 1906, 34 S. L. 798, U. S. Comp. Stat., p. 1168—a statute that was passed for the express purpose of remedying the complaint that guilty parties could *volunteer* their testimony in these Interstate Commerce investigations and thereby obtain an "immunity bath"—viz.:

That such "immunity shall extend only to a natural person who, in obedience to a supboena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

Heike *v.* U. S. 217 U. S. 431.

The second step, the testimony given by the witness—It was shown that at these prior investigations under the Sherman Anti-Trust Act Petitioner had given oral or documentary evidence of the following facts:

He furnished the Grand Jury with proof of the formation of the American Sugar Refining Company of New York. (1 Record, fols. 294-303.)

He furnished oral and record evidence of his election and the fulfillment and discharge of his duties as secretary and treasurer, secretary of the New York corporation, and secretary and

treasurer of the New Jersey corporation from its commencement. (1 Record, fols. 274-6.)

He furnished evidence that in the discharge of his duties he signed and endorsed checks as treasurer. (1 Record, fols. 283 *et seq.*)

He furnished evidence and testified in regard to the output and the capacity of the Havemeyer & Elder Refinery in Brooklyn, which was the refinery in question, on the docks of which the frauds by the use of the appliances and the different scales were perpetrated. (1 Record, fols. 304-308.)

He furnished evidence orally and also tabulated statements showing actual "meltings of each refinery from 1887 to 1909." (1 Record, fols. 313, 320.)

He furnished evidence of the ownership of the Havemeyer & Elder Refinery in Brooklyn, and of the ownership of the property belonging to said refinery, including the scales upon which the fraudulent weighing was made, and also furnished books, papers and documents containing other important matters necessary for the proof of the Government's case or necessary in tracing out and preparing a case against the defendant. (1 Record, fols. 252-366.)

He furnished evidence of his handwriting . (1 Record, fol. 283.)

The third step necessary to establish the plea in bar, namely, the *connection* between the evidence given by Petitioner and the discovery of the crime for which he was subsequently indicted, is a matter of mixed law and fact; the giving of the testimony under the circumstances required by the immunity statute is matter of fact, but whether it "concerned," in the meaning of the statute, the subject-matter of the indictment is a legal conclusion. Strictly speaking, it is not necessary to show that the testimony was *used* in procuring the indictment; it is only necessary to

show that it *concerned* the transaction, matter or thing on account of which the Petitioner was indicted—although one of the Government's erroneous points in the court below was that the immunity does not apply unless the witness' testimony is actually used in procuring his subsequent indictment (*post*, Point II). But if the testimony was actually used in procuring the indictment in this case, either by producing a transcript before the grand jury, or to ferret out other evidence that was produced, or as a clew leading up to the discovery or proof of the crime, that *use* was a fact that had to be shown at the trial, while its *concern* with the crime found was a matter of law and ratiocination.

The relevancy of Petitioner's testimony in the Sherman Act investigations to this indictment cannot be here disputed, we think. In the first place, as already stated, the replication, which serves to frame the issue on this point, admits the relevancy of the testimony (*post*, Point III). It denies the validity of the plea *insofar* as certain new matter stated constitutes a valid reply—that is, insofar as the facts, that the testimony was given and the indictment was found on different occasions and in different proceedings, that the offence for which the indictment was found and the subject of the Anti-Trust examination were different, and that witness gave his testimony without protest or claiming privilege, avoid the effect of the plea, it is denied—but insofar as said new matter does not avoid the effect of the plea, it stands admitted. And from this view of the issue, surely the mere relevancy of the testimony, that is, that it "concerned" the finding of the in-

dictment, stands admitted, provided the new matter in reply be shown to be insufficient, as we think it has been shown, both in law and in fact (*post*, Point III).

In the second place the court below, whose decision we are now reviewing, expressly found that some of the evidence given by the Petitioner was essential to the Government's case on this indictment. The court below conceded this point—in truth, the policy of the Government throughout has been to concede the truth and relevancy of the testimony we have pleaded in bar, but to avoid its effect for other reasons—and overruled the plea on an entirely different ground, namely, that Petitioner gave his testimony as an officer of the Sugar Company under investigation, and hence was not entitled to immunity for himself *personally*, under a rule erroneously thought to have been laid down in *Wilson* v. *U. S.*, 221 U. S. 361 and *B. & O.* v. *I. C. C.*, 221 U. S. 622-3 (2 Record, pp. 1645-6, 1661). That is to say: The plea of immunity may be contested at two points, its *acquisition* and its *application;* the question of relevancy concerns only the point of application, the *extent* of the immunity, admitting it to have been duly acquired by the indicted person; the point made by the learned Court of Appeals goes only to the *acquisition* of the immunity, that is, that it is not acquired at all by the officer, in person, who produces a company's books any more than by the corporation itself. We intend to show that the learned court erred on this question (*post*, Point IV). But aside from the error of it, a reversal of the decision on this special point will entitle us to judgment sustaining the plea in

bar; the learned court below conceded to us all questions of *application* to this particular case, if it had been duly acquired by the Petitioner personally; and it would not be right now, this Court having reversed the lower court on the special point on which it based its decision, to send the case back for a new trial on the plea in bar, in which relevancy and other questions of application of the immunity may be raised and litigated as new matters of avoidance, when it was conceded, and the decision of the court below was founded on the assumption, that if the immunity was rightly acquired in the first place, it did extend to—that is, the testimony giving it did concern—the subject-matter of this indictment. The vital question on this review, and the only necessary one to decide, we think, is the correctness of the decision of the lower court, that an officer who is compelled to testify on behalf of his corporation does not thereby acquire any personal immunity for himself individually, under the statute (*post*, Point IV).

The decision below, after reciting other testimony given by Petitioner at said inquisitions under the Sherman Act (2 Record, fols. 4931-4), finds:

"There was furnished to the second grand jury a statement giving actual meltings of each company operated by the American from 1887 to 1907, showing the pounds of sugar melted each year in each refinery, which included the amount melted by the Havemeyer & Elder refinery for the period covered by the prosecution. This statement was produced by Heike. On the trial of the present indictment it was essential to show the true weights of certain importations, and in order to enable the jury to determine what they were proof was made of the quantity actually melted at that

refinery. As to these meetings the plaintiff-in error contends:

" 'But the kernel of the case lies in the proof of the actual meltings and the quantity of sugar produced at the Havemeyer & Elder Refinery. These meltings represented the weights made by the custom house employees on the dock. These weights presented the bases upon which were prepared the calculations and statistical table which were later on in the trial presented to the jury, and which purported to show that the result in manufactured product was greater than warranted by the number of pounds of sugar melted. This fact Mr. Heike testified to (before the grand jury).' "

"The government contends that this statement of total meltings was volunteered by Heike, and there is some uncertainty as to just how it was furnished. *We disregard this, however, and will assume that the grand jury subpoena called for just such a statement and that it was furnished, to the grand jury in response to such a call.*" (Record, fols. 4935-6).

"As to Heike it was shown that he took action to effect a change in the methods of bookkeeping by making additions to the intake figures after they reached headquarters, which it was contended was consistent only with knowledge that the government weights were being abnormally reduced and with intent to cover up the transaction. Statements made and action taken by Gerbracht were testified to, which it was contended were consistent only with guilty knowledge and participation. Letters written by both defendants were put in evidence. Finally they both took the stand, were examined and cross-examined at great length—a cross-examination in which some of the jurors participated" (fols. 4985-6).

In the third place the Petitioner appeared before the grand juries investigating the Sugar Trust, in answer to the Government's subpoenas, and made the full disclosure under oath and produced the voluminous records found in the evi-

dence—prepared tabulations, compiled statements, and rendered so much service to the United States in these investigations under the Sherman Anti-Trust Act, that it called for a letter of thanks from the District Attorney, and especially requesting Mr. Heike to furnish a further table of actual production of refined sugar (1 Record, p. 316). But the connection between Petitioner's whole testimony and the sugar-weighing frauds for which he has been indicted is such a tissue of law and fact that we leave further statement in this regard to the subsequent law point III.

Errors, Exceptions &c.

Verdict directed, refused; exceptions at trial (Record, fols. 816-7).

Motion in arrest of judgment, fols. 4112-3.

Assignment of errors, fols. 4165-8, 4343-4.

The sufficient exception taken both by motion in arrest and assignment of error, preserving for review by this Court all the errors committed by the Court below in overruling the plea in bar, and the benefits of exception in the rulings of the Trial Court, is the following:

93. "That said Court erred in denying the motion made on behalf of said defendant Heike in arrest of judgment on the following grounds severally and collectively:

* * * * * * * * *

"Fifth. Because the Court erred in denying the motion of this defendant for the direction of a verdict in his favor at the close of the trial of this defendant's special plea in bar.

"Sixth. Because error was committed in granting the motion of the Government for the direction of a verdict in his favor upon the special plea in bar interposed by this defendant.

"Seventh. Because the defendant is now entitled to immunity, it clearly appearing from the evidence adduced upon the trial under the special plea in bar, and from the evidence adduced on the trial of the issue under the plea of not guilty, that the defendant Heike was tried under an indictment for a matter, concerning which he gave evidence in his examination before the several Grand juries as appears of record."

Denied (Record, fol. 4113). Exception (fol. 4114).

Besides the general question of the bar of the immunity statute, when pleaded as a *pardon, or amnesty* from prosecution, for the offence charged in the indictment, the learned Trial Court erred in treating and applying the statute as a *rule of evidence.* Points of this kind are covered by Assignment of Errors, Nos. 16 to 20, viz:

"16. That the said Court erred in refusing to grant the motion of the defendant to instruct the jury to return a verdict in favor of the defendant upon the plea in bar interposed by him.

"17. That said Court committed error in directing the jury to return a verdict for the Government, and against the defendant on the defendant's plea in bar.

"18. That the said Court committed error in not submitting the issues raised by the pleadings herein to the jury and that in so doing he deprived said defendant of his right to trial by jury in violation of his rights, privileges and immunities under the constitution of the United States.

"19. That the said Court erred in that its decision and direction of a verdict in favor of the Government and against this defendant violated the true construction and application of the fifth amendment to the Constitution of the United States and the Statutes of the United States of February 25, 1903, Chapter 755, Section 1, as

amended by the Act of Congress of June 30, 1906, Chapter 3920, which was duly enacted to give force and effect to said amendment to the Constitution.

"20. That said Court erred in its decision and direction of the verdict in favor of the Government and against this defendant in that under the evidence had on the trial of the issues herein it appeared without contradiction that under and by virtue of the Act of Congress of February 25, 1903, Chapter 755, Section 1, as amended by the Act of Congress of June 30, 1906, Chapter 3920, commonly known as the Immunity Statute, the Government had no power to prosecute said defendant with respect to the charges set forth in said indictment, and said Circuit Court was without any jurisdiction to take cognizance of said prosecution, which said prosecution had been by law withdrawn from the power either of the Government or of the Court and the Court was therefore at all times from the finding of said indictment and is now wholly without jurisdiction to take any further action in said prosecution against said defendant."

Final judgment overruling plea in bar and finding Petitioner guilty (Record, fols. 89, 91, 94). Writ of Error (pp. 2-3). Decision by Court of Appeals on plea in bar (pp. 1642-6). Judgment of affirmance (p. 1662).

Outline of Argument.

Although it is necessary to show but one essential error, on this review, in order to secure a reversal of judgment below, to wit, the error of the learned Court of Appeals in basing its decision upon the single point of law, that a corporate officer secures no *personal* immunity by testifying about the internal affairs of his own corporation, then being investigated under the Sherman Act,

yet so many erroneous views were urged at the trial, which may be advanced again on the theory that, while the Court below may have placed its judgment on one erroneous point in this instance, yet there were other grounds on which the learned Court might have affirmed the judgment without error, and since these adverse views of the Government are all founded on a wrong theory of the immunity statute, and since they are all refuted by establishing the true theory on which the statute operates, we begin argument with the *theory of the statute,* relegating the critical error in the judgment aforesaid to a later point. Accordingly, we say: (I) That the statute of immunity is a statute of *amnesty,* operating by way of a *pardon,* and not, as the Government contends, a statutory *privilege,* which a witness must claim when he takes the stand, or else he will be deemed to waive it, like the 5th amendment to the Constitution, and operating by way of a *shield against self-incrimination;* (II) that this true theory, that the statute operates like a pardon, going into effect immediately upon the witness answering the subpoena and testifying, *ex proprio vigore,* by force of the statute alone, unconditionally, and without further requirement from witness, affords a complete answer to the numerous points raised by the Government at the trial, and adopted by the Trial Judge, but discarded by the learned Court of Appeals in favor of the new theory aforesaid of its own invention.

Questions arising from the Statute of Immunity are of *two distinct kinds;* those concerning the *acquisition* of it and those concerning its *application* after it has been acquired. The points made against the immunity in the trial court were all

over its acquisition, that it must be claimed in advance or never acquired, like the constitutional privilege, and so is the point on which the decision of the Court of Appeals turns. The other class of questions are as to whether the immunity, once acquired, applies to a particular offence with which the ex-witness is charged. When we say there is no analogy between the Immunity Statute and the Fifth Amendment, we mean, in point of acquisition; there are a number of technical conditions, established by a long line of decisions, that must be complied with before a witness can acquire the constitutional immunity from having his testimony used to criminate himself, but there are but two conditions precedent to the acquisition of the statutory immunity, obedience to a subpoena and testimony under oath. It is upon the point of acquisition that the Government lays its chief arguments; and it is upon the total lack of analogy therein between the Constitution and the statute that we rely to show the fallacy of those arguments. But upon the point of application there is an analogy between the statutory and the constitutional immunity; whether it operate as a pardon or as a shield against self-incrimination, it *extends* to any crime, not only the very one under investigation when he gave his testimony, but also any other one, incidentally discovered or led up to, or where the constitutional immunity is in question, where the evidence given forms "one link" in the proof of the offence subsequently charged against the witness.

In this sense of the word we show in Point III that the immunity gained by the Petitioner extends to, that is, his testimony "concerned," the sugar weighing frauds for which he has been indicted, and therefore he is immune from this pros-

ecution. In Point IV we endeavor to show that the point on which the learned Court of Appeals relied, to wit, that a corporate officer, compelled to testify on behalf of his corporation, acquires no immunity, is against all law and precedent.

POINT I.

The Immunity Statute herein pleaded in bar is a Grant of Amnesty from the Sovereign, operating by way of a Pardon from the Government. It bears no analogy, either in conditions of acquirement or in mode of operation, to the Constitutional Privilege of the Fifth Amendment.

The decision of this fundamental question of theory should settle the whole case. For it is undisputed that the Petitioner gave testimony under oath, and in obedience to subpoena, for the Government, in an investigation under the Sherman Act—the simple conditions precedent required by the statute—while the immunity, thus gained, operates as a bar to prosecution of witness without further limitation or condition, except that the bar is limited by statute to such offences only as are concerned in, that is, discovered or led up to by, the testimony. On the other hand, the main contentions of the Government are based upon the objection that the Petitioner has not complied with the numerous and different requirements attached to the Constitu-

tional privilege, *e. g.*, that he did not protest or claim privilege in advance when taking the witness stand, and that his immunity is to be measured by that given by the Constitution, to wit, the right to exclude the use of the testimony in his subsequent prosecution. Petitioner's position is that he *has* complied with all the conditions required by the Immunity Statute; Government's position is that he has *not* complied with all the conditions required by the Constitutional Privilege. One is a self-executing grant of amnesty; the other is a rule of evidence debarring self-incrimination. The correct theory of the statute must, therefore, be settled first. The other points are incidental and minor thereto, and are practically disposed of when the Court shall have determined that this is a *new* statute untrammeled by the peculiar limitations and conditions environing the Constitutional privilege.

1. There is a fundamental distinction between the constitutional privilege and the statutory immunity. It is apparent on the very face thereof.

The 5th Amendment to the Constitution reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

The statute of immunity reads:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, or otherwise, in any proceeding, suit or prosecution under said Acts" (including Sherman Anti-Trust Act).

The first proceeds upon the theory of a shield against *compulsory self-incrimination*, given by *sovereign* to citizen.

The second proceeds upon the theory of a *pardon* or *amnesty*, given by the *government* to the citizen.

The difference is even greater in the *consequences* that flow from the practical application of these two kinds of immunity than appears on their face. These differences appear in the *acquisition*, in the *extent* or *scope*, in the *rule of construction*, of the immunity.

(1) The following *conditions* accompany the *acquisition* of the constitutional immunity, all springing from its nature as a defense against self-accusation:

(a) Necessity of *claiming* privilege.

(b) Waiver by *voluntary* testimony.

(c) Necessity of *scienter*. If the offense be hidden from his knowledge, of course the witness cannot plead privilege, and hence loses his protection against self-incrimination.

None of these conditions attach to the acquisition of the statutory immunity; the terms of the statute, the grant of immunity and the pledge of non-prosecution are *unconditional* in every respect, except that they do not apply to matters unconcerned with the testimony given.

(a) The witness does not have to *plead privilege* on the stand; he is *pardoned in advance* for every offense discovered by his testimony. He does not care whether he *incriminates* himself or not; he stands as if he had a pardon in his pocket when he went on the stand.

(b) For the same reason, there is no *waiver* by voluntary evidence; as he has no need to plead privilege, there can be no waiver inferred from omitting to plead it.

(c) There is no necessity of *scienter;* as the witness' immunity proceeds upon the theory of a free pardon for everything disclosed by his testimony, it matters not whether he knew, or did not know, of the offense discovered.

(2) The following *limitations* are placed upon the *effect* or *extent* of the privilege:

(a) The effect is limited to preventing the use of the *very evidence given*, against the witness in another case.

(b) Its scope is limited to exculpating him from prosecution for the *identical offense* under investigation.

With the statute, however,

(a) The immunity is not limited to the use of his *own words* against himself, but he is immune from prosecution through any other person's evidence, or by any evidence whatever.

(b) Its effect is not limited to amnesty from prosecution for the *identical offense* under investigation, but extends to all offenses concerned in or disclosed by his discovery. This point in our analysis should be the important question in cases of this class; and in the trial court it was, for it was conceded that immunity was duly acquired, that is, that the two conditions precedent to its acquisition, subpoena and testimony, had been duly performed. But the decision of the learned Court of Appeals went off

on another ground, conceding this condition also, and relying upon a point in avoidance, which we answer in this brief, *post* Point IV. However, the point of greatest public interest in the case, held against us by the Trial Court, avoided by the Court of Appeals, and not yet definitely decided by this Court, is, Does a witness at an Anti-Trust inquest become immune for an offense, not the offense under investigation, but *another* offense that is discovered or led up to by his testimony? This question is of such vital importance that we have made a special point of it, *post* Point III; yet it is all involved in the leading question of "pardon or privilege," for if the pardon be limited to the extent claimed by the Government, it will be no pardon at all for practical use, the intention of Congress will be nullified, the statute will be rendered futile.

(3) *The rule of construction* differs in the two cases. A broader construction is required in the case of the statute. The foregoing conditions and limitations are applied to the immunity statute by analogy drawn from the 5th Amendment; the following rules of construction are drawn from other sources and other analogies, but are equally applicable to the Constitution as to the statute; they are corollaries to the narrow construction adhered to by our adversaries and the courts below:

(a) That the immunity should receive a strict and narrow construction because it is "in *derogation* of the sovereign power to punish."

(b) That *public policy* favors a narrow, and is opposed to a broad, view of the immunity provision.

(c) That the language of the statute, "concerning which *he* may testify or produce evidence," should be so narrowly construed as to exclude him from the benefit of the immunity personally, on the very technical ground that he was testifying at the Anti-Trust inquest as an officer and agent of the Sugar Company, and therefore it was *not his* evidence that was given them, but that of the Company; so that if any one were exculpated for the crime revealed, it would be the corporation, and not Heike personally (*post* Point III).

On the other hand, the pardon theory of immunity, as we shall show, affords a complete refutation of any narrow rule of construction, *e. g.*:

(a) It seems odd that the Government should claim a narrow construction for the immunity statute, which they also claim to be a substitute for the 5th Amendment, on the ground that it is *in derogation of the sovereign power to punish criminals;* the whole constitution is in derogation of sovereignty, and the bill of rights, especially, is in derogation of the sovereign power to punish, but nothing is better settled than that these guaranties of liberty should receive a liberal construction. Yet such is the position taken by the Government (1 Record, fols. 792-3, 806). We can but regard such casuistry as the result of a false view of the immunity statute, which will dissolve when the statute is treated as an act of amnesty.

(b) *Public policy* requires a broad construction of the immunity provision.

(c) And so of the Government's claim that the immunity does not shield the petitioner *as an in-*

dividual; that it was not *his* testimony, because he testified and produced evidence, *as an agent* of the Sugar Company. This is the chief ground advanced for the decision of the learned Court of Appeals (2 Record, pp. 1646-7). This Court has indeed held, in *Wilson v. U. S.*, 221 U. S. 361, and similar cases, that a director or custodian may be compelled to produce books of a corporation; but there is nothing in those cases to the effect that the witness thereby loses his immunity; on the contrary, it is held in *I. C. C.* v. *Baird*, 194 U. S. 25, that such witness retains his *personal* immunity. Any other ruling would be in the very teeth of the statute. And we can only regard this part of the learned opinion below as influenced by the erroneous assumption that the immunity in question means merely freedom from compulsory self-incrimination; for what avail would pardon be, pledged chiefly as an inducement to corporate officers and agents to disclose inside information of large corporations and trusts, if it were ruled that the witness should receive no personal benefit himself.

2. **The Plain Language of the Statute itself** shows that it confers general amnesty, and should operate as a pardon, and not in the way the old constitutional privilege does.

The law first commanded the witness to testify whenever summoned by the Government in any of these investigations under the Interstate Commerce and Anti-Trust Acts. The earlier acts, enacted to effectuate the growing popular desire for legislative investigation and control of trusts and monopolies and railroad combinations, were

evidently prepared for the purpose of doing away with the Constitutional privilege of witnesses.

The Act of Jan. 24, 1862, §103, R. S. read:

"No witness is privileged to refuse to testify . . . . upon the ground that his testimony . . . . may tend to disgrace him or otherwise render him infamous."

Thus it provided, §859 R. S. (Act of Jan. 24, 1862, ch. 11, 12 S. L. 333):

"No testimony given by a witness (*i. e.* no *such* testimony). . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. . ."

§860 R. S. provided (Act of Feb. 25, 1868, ch. 13, §1; 15 S. L. 37):

"No pleading of a party, nor any discovery or evidence from a party or witness. . . . shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture"—(except perjury).

It is evident that these early statutes were not intended to operate as a grant of *amnesty* but as merely an allotropic substitute for the Constitutional privilege or shield against self incrimination; the immunity, such as it was, was conditioned on *compulsion*, and by compulsion was meant, not merely that witness was haled to the stand by subpoena, but that he had first to decline to testify, pleading the constitutional privilege, and was thereafter compelled by the Court or congressional committee; and it was argued that the privilege of these statutes went no further than the exclusion of the very evidence the witness had given in a subsequent criminal proceeding against

him. It is evident they went no further than the protection of witnesses *on the stand;* no change in their subsequent operation was contemplated different in effect from the Constitutional Amendment. However this may be, it will be seen that the object of the statutes was to give as little as possible to the witness in exchange for the deprivation of his Constitutional privilege; they were calculated to offer but slight inducement to those who knew to come forward and make a free and full disclosure of the internal affairs of large corporations and trusts. The defects of Section 860 have been much discussed; the immunity it offered to witnesses has been held not to equal that guaranteed by the Constitution (*Counselman v. Hitchcock*, 142 U. S. 547). Its chief failure has been as an inducement to qualified witnesses to make discovery of the inside working of great corporations, monopolies and trusts. That was the giant evil the people sought to remedy, not the petty offenses of individuals. For that purpose an ounce of reward is worth a pound of force. And later, as the agitation increased, and it became evident that the people cared less for punishment of individuals than for exposure of a clandestine system, Congress passed the *Act of February 11, 1893;* 27 S. L. 443:

"No person shall be excused from attending and testifying or producing books . . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. *But* no person shall be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing, concerning which he may testify, or produce testimony, documentary or otherwise."

This provision was held to be a sufficient substitute for the Constitutional privilege (*Brown v. Walker*, 161 U. S. 591). But we call attention to the conjunction "but" with which the provision begins. Congress had stricken out the provision of former statutes that might be construed as limiting immunity to the *use* of former testimony to criminate him, and broadly provided that the ex-witness should not be prosecuted by means of his own testimony or by any other testimony or means. But the proviso for immunity still might seem contingent on compulsion, not the ordinary compulsion of a subpoena, but compulsory testimony forced from witness after he has tried to *excuse* himself. The conjunction "but," in the statute, denotes opposition to what goes before. It might be argued that witness must first attempt to be "excused"—and that means that he must plead privilege—before the immunity can be granted; the language is that such plea must be overruled, *but* in that case the witness shall not be prosecuted on account of what he tells.

The fault of the statute of 1893 was this unfortunate syntax, or ambiguity. Accordingly the statute of 1903 was passed, removing the former condition, or semblance of condition, that the witness must offer an excuse and be overruled before immunity issues, and taking the form of a grant of *general amnesty*, operating as free from conditions, limitations and restrictions as a pardon—thereby establishing its *prime* object as the inducement of full discoveries from unterrified witnesses, and making individual punishment a *secondary* consideration.

The Act of February 25, 1903, 32 S. L. 904, continued by successive annual appropriation acts,

quoted in full *ante*, p. 9, begins with an appropriation for enforcing the provisions of the Interstate Commerce Act of February 4, 1887, and the Sherman Anti-Trust Act of July 2, 1890, and then enacts the immunity proviso as though it were a separate statute. Its grant of immunity is not contingent on anythng to be done or left undone in either of the statutes previously mentioned. It is independent of any idea of prior compulsion; it occurs in an appropriation act. It is inserted as a proviso, it is true, but it is a proviso annexed to an appropriation of money, and is not a proviso annexed to the compulsion of witnesses. It does not say that the testimony given by the witness shall not be used against him as some of the early statutes did; but says that it shall not be prosecuted by any means or evidence whatever. It does not say, as some of the earlier statutes might be construed as saying, that the immunity shall issue at all events in case the witness is compelled to testify after pleading his constitutional privilege; but says that it shall issue as soon as he obeys the subpoena and takes the witness stand. It contains no prelude like that in the Act of 1893, "No person shall be excused from attending and testifying * * * *on the ground* * * *. But*" if he is so compelled to testify, he shall not be prosecuted, &c.; it merely enacts that witnesses shall be exempt from prosecution as soon as they testify, no matter whether their testimony be compulsory or voluntary.

By "compulsory" and "voluntary" we do not mean that a mere volunteer may appear at an anti-trust investigation and get an "immunity

bath" *nolens volens*, as our learned adversaries may pretend we mean; the statute requires that the Government must summon him by subpoena. But that is the only compulsion required; when he has obeyed the subpoena, he may testify willingly and freely without going through the formality of first refusing and then being compelled to answer questions. It is an absurd incongruity that a man cannot receive amnesty or pardon without first declining and being compelled to accept it.

Nevertheless it has been argued that the immunity statute of 1903 is patterned on the Constitutional Amendment, and requires a claim of privilege and compulsion before the witness can gain immunity.

U. S. *v.* Kimball, 117 F. R. 156, 163, 166, 168.

State *v.* Murphy, 128 Wis. 221; 107 N. W. 470.

The learned Trial Court also took that view, and based its decision upon it (1 Record, fols. 807-9). And we understand our learned adversaries still adhere to this argument, drawn from the peculiar syntax of the Act of 1893, and apply it to the Act of 1903, which is constructed on a radically different plan.

But there is no such provision or implied condition in the plain language of the statute, which on its face purports to be an unconditional pledge of immunity, except that the witness must be subpoenaed and testify, and the accusation against him must be "concerned" or led up to by the discovery. Furthermore we shall show that the con-

ditions attempted to be imposed upon the immunity are impossible and absurd and would frustrate the whole design of the statute.

The proviso excepting perjury from the immunity also shows that it was intended to give it a broader scope than the Government now contends for. The proviso, immediately following the immunity clause, is:

"Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

If the narrow view be held, that the immunity provision merely shields the witness from prosecution for the matter concerning which he testified, the perjury proviso would be idle surplusage, for he did not testify concerning perjury; but if it be taken as a pardon for all offenses springing out of, connected with, or concerned in his testimony, then the exemption of perjury from the list of offenses pardoned fulfills an intelligent function. Mr. Justice Shiras pointed this out in *Brown v. Walker*, although not affirmed, denied or discussed by the other Justices:

"What is the meaning of the clause of the Act, that 'no person so testifying shall be exempt from prosecution and punishment for *perjury* committed in so testifying'? The implication would seem to be that, except for that clause, perjury could not be imputed to a witness who had been compelled to testify" (161 U. S., 622).

We have expressed the idea that the immunity is a statutory grant of *amnesty*, taking effect as a pardon. By this distinction we mean that the amnesty itself is an act of grace from the sov-

ereign, enacted into law by Act of Congress, but that it is applied to specific cases, as a pardon is, by the Government. It differs from a Presidential pardon in that the latter is the act of the Government—the President is the author of it—whereas the amnesty is the act of the sovereign itself, carried into effect by the Government. The Court treats them in the same way, although one is the decree of the sovereign people and the other only the decree of the President. And this affords a perfect explanation of the opinion of this Court on a certain question when the case was before it on the writ of error, without deducing therefrom the extreme conclusions that our adversaries have made. The Court said:

"In view of the provisions of this act, it is argued that the complete immunity promised is not given unless the person entitled to the benefits of the act is saved from *prosecution*, for it is contended that if the act is to be effective, it means not only immunity from *punishment*, but from *prosecution* as well. It is admitted in the brief of the learned counsel for the plaintiff in error that prosecution must necessarily proceed so far as an indictment and apprehension are concerned, but when the plea of immunity under this act is entered, if well taken, the prosecution must be ended, as the statutes provide that no person shall be prosecuted, etc. But we are of the opinion that the statute does not intend to secure to a person making such a plea immunity from prosecution to provide him with a shield against successful prosecution, available to him as a defence; and that when this defence is improperly overruled, it may be a basis for the reversal of a final judgment against him."

Heike *v.* U. S. 217 U. S. 431.

This decision does not justify the far-fetched deduction made in the trial court, and perhaps

here, that this Court holds a witness may be prosecuted in such cases notwithstanding the statute. All the opinion means in this regard is that the law allows defendant to be prosecuted by the Government until he enters his plea and it is passed upon by final judgment. So if he has a pardon from the President he must plead it; if he has already been tried and acquitted, he must plead acquittal; and the court has jurisdiction to pass upon it, and its final judgment, if erroneous, may be reversed by a higher court. The amnesty statute, in such case, operates just like a pardon.

The Ruling, that the Immunity Statute is a "Substitute" for the Constitutional Privilege, does not mean that they are the Same Thing, subject to the same Conditions and Limitations.

This court has used the expression that the statutory immunity is a "substitute" for the Constitutional privilege; so it is for the practical purposes the court was considering, but not an equivalent in all the logical consequences of exact equation. Both *Brown* v. *Walker* and *Counselman* v. *Hitchcock* were cases over the right to compel witnesses to testify when they had protested that their evidence might incriminate them, pleading the constitutional privilege; and the question under decision was whether the statute afforded them equal immunity to the Constitution, that is, whether the statute shielded them from the use of their evidence to incriminate themselves. In that case it was proper to speak of the immunity statute being a "substitute" for the constitutional privilege. In *Counselman* v. *Hitchcock* the court held that § 860 R. S. was not a sufficient

substitute, because it did not go as far in shielding the witness from the subsequent use of his testimony to criminate him as the original constitutional provision did. In *Brown* v. *Walker* the court held that the act of Feb. 11, 1893,—and *a fortiori* the act of Feb. 25, 1903—was a sufficient substitute because it operated as a general amnesty or pardon, eliminating all danger of subsequent prosecution. In both cases the question concerned only the rights of a witness on the stand, and the term "substitute" was used because the question was whether the statute shielded the witness from self incrimination as well as the Constitution did. The Court had no idea of pursuing the simile to all its logical consequences, going so far as to imply, as the learned Trial Court and our adversaries assume, that the immunity statute is but an *allotropic* substitute, subject to the same conditions as to acquisition and application, and taking effect only in the same way and to the same limited degree, as the Fifth Amendment.

This Court has indeed held the statute to be a sufficient substitute, when offered by the Government in avoidance of a plea of constitutional privilege by a witness on the stand; but that does not mean the same conditions are to be enacted. There is nothing on the face of the statute indicating that any conditions whatever are required; it is a free grant of amnesty from prosecution in return for a free discovery from the witness. It is for a different purpose, to procure evidence against trusts and combinations, while the aim of the Constitution is to guard citizens against self-incrimination. It is as independent of the Constitution, apparently, as though the Constitution never existed.

4. The absurdity and impossibility of imposing all the conditions and limitations of the constitutional privilege shows that the immunity statute was intended to operate as a grant of amnesty or pardon.

It is absurd to limit amnesty to crimes the witness bears in mind when he takes the stand, especially to exclude the many offences hidden in corporate books of which he has no personal knowledge.

It is absurd to require the witness to *plead* amnesty in advance, as he does a privilege. He has the privilege, but not the amnesty, when he takes the stand. He does not acquire the amnesty until after he has testified. It would be requiring him to make profert of a pardon before he has got it. The time to plead a pardon is when he is prosecuted afterwards.

It is absurd to claim that an amnesty is *waived* by not claiming it when witness takes the stand. The only way to waive a pardon is not to plead it when the subsequent prosecution comes on.

It is absurd to say that *voluntary* witnesses should not be amnestied, provided they have received the statutory subpoena. Volunteers do not gain the *constitutional* immunity, because it is a condition precedent that witness claim privilege before testifying; but when a witness voluntarily testifies before an anti-Trust inquiry, it is all the more reason that he should have the benefit of the statute.

It is absurd to say that *knowledge* of the crime in question makes any difference in the case of amnesty. It may in the case of the constitutional privilege; for a witness cannot preserve it without pleading it on the stand, and he cannot plead

without knowledge. But an amnesty statute works *ex proprio vigore;* if the witness performs the conditions prescribed by the statute, it goes into effect at once, without further requirement, no matter whether he knows of a crime or not. Known or unknown, it suffices that the crime was discovered or prosecuted or led up to or otherwise concerned in his testimony, and immediately his immunity issues.

It is absurd to put hindrances and restrictions on witnesses when the intention is to gain the freest possible information.

4. The Public Policy of the Statute shows that it should operate as a grant of amnesty or pardon.

A widespread, powerful and patriotic impulse governed the formation of these anti-Trust laws. The people were determined to unlock the system, to expose the secret machinations of these giant trusts and monopolies, and then reform and regulate them—punishment was a minor consideration. A strong immunity was needed to persuade witnesses to testify under Interstate Commerce and Anti-Trust investigations. Those acts refer to gigantic companies controlling transportation, commerce and industry throughout the whole country, with their arbitrary powers, favoritism and unfair discriminations and rates. The nation was aroused with a determination to control, regulate and punish them. The first step in any law for this purpose was investigation; the obvious difficulty was to procure inside information. The suppression of such combinations and trusts had to be the chief aim of any effective law; the punishment of individual offenders was a mere baga-

telle in comparison; it was hardly considered, or at most treated as a very secondary matter. Hence the evolution of the immunity statute.

Section 860 R. S. was inefficient; it was too restricted. Then came the Act of Feb. 11, 1893; it was annexed to a statute of compulsion. Afterwards came the Act of February 25, 1903; cut off and set apart from any statute compelling witnesses to testify; offered as an act of grace, amnesty to all witnesses, a free pardon for all offenses disclosed; immuning from prosecution by any evidence or any means. The statutes were intended to provide a means of uninterrupted investigation, by which great questions affecting the public welfare might be examined; abuses by corporations of the laws of trade and commerce traced out and exposed, and all oppressive and discriminatory acts of railroads and others be fully laid bare. The object of such laws was not, primarily or chiefly, to secure the prosecution of individuals. It was to secure the reform of these gigantic abuses, and to enable a remedy to be provided by the Interstate Commerce Commission, the courts, or Congress. To make the prosecution of the individual, which is only incidental, the chief thing, would be to subvert the purpose of those laws. It is vastly more important to be able to correct corporate abuses, pursue and chastise trusts and monopolies, reach the root of the evil, and by wise corrective measures furnish a cure, than to prosecute any individual.

It was intended by this offer of immunity to open wide the door of investigation. The only limit put upon the immunity promised is that the proceeding or investigation, in which the witness is called and testifies, must be one under the In-

terstate Commerce or Sherman Anti-Trust Acts, and that the immunity shall not extend to offenses not concerned in the discovery. The door would not be opened very wide if a witness were compelled to go before these bodies and, when questions were asked, plead his constitutional privilege and seek the aid of a Court to enforce it. The investigations would be hindered and interrupted and delayed beyond endurance; while the very object of the immunity clause was to make them free from hindrance or objection by assuring witness of perfect security from prosecution by any means or from any source, "for any act, matter or thing concerning which he testifies."

We adopt the words of Judge Humphrey in the *Armour* case, 142 F. R., 819, 826:

"It is necessary to look into the purposes of Congress in passing the commerce and labor act in order that the Court may determine what construction will best carry out the legislative intent. It is the duty of the Court in construing an act to give it such construction as will carry out the legislative purpose expressed in the act itself. It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such remedial legislation as might be found necessary. I regard this as the primary purpose, the chief purpose, a legislative purpose. It is clear from the act itself, that, if there be a secondary purpose, the primary purpose, the legislative purpose, was vastly more important in the mind of Congress than any other. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them in case they needed strengthening. In my judgment, the purpose of every one of these laws, the high aim of Congress in passing them, was a determined pur-

pose that the corporation, the creature of the law, should not be allowed to grow beyond the law. The commerce and labor act is the repeated attempt of Congress to bring to its aid such information as would enable Congress to do whatever might be necessary for the control of corporations. Perhaps a secondary purpose was the punishment of offenders. It is perfectly clear to my mind that this was not the main purpose, because there were abundant laws already on the statute books for that, and a great department skilled in the work of punishing offenders. * * *

"It is contended * * * that the construction here given * * * would result in the failure to convict individuals * * * that guilty persons would rush to the officer with their evidence and receive immunity. The answer to this contention is that the primary purpose of the Act is to correct defective legislation, and if an additional purpose be the prosecution of offenders, such additional purpose is clearly secondary. To effect the primary purpose, viz., secure information for the use of the legislative body, the construction here given would be highly efficient, as the persons required to give evidence, being personally immune, would probably testify willingly."

Besides this, we understand our learned adversaries contend that the construction of the immunity statute as a statute of amnesty, offered as an inducement to witnesses who know to come forward and testify concerning the inside workings of these vast trust combinations, would be *immoral*, something in the nature of bribery. Such inducements have been offered to witnesses for centuries, whenever the government has felt especially desirous of obtaining inside information of this kind, without any one reproaching it with immorality, as this Court says (*Brown v. Walker*, 161 U. S., 601). But all we have to say

at the moment is, that all arguments of this kind should be addressed to Congress and not to the courts. Whether an amnesty statute of this kind is moral or immoral is a political question; and it is sufficient for this Court and all good citizens to know that Congress, in its legislative discretion has deemed it advisable, in the best interests of the county, to enact this law and to offer this inducement in order to secure much needed information concerning giant trust and trade combinations.

(5) The Weight of Authority shows that the Immunity Statute is an Act of General Amnesty, and therefore should operate as a Pardon from the Government.

The word "general" in the foregoing sentence is that used by the courts, and refers to the *means* of prosecution and to *offenses;* that is, there is a general amnesty from every manner and means of prosecution, but not for every offense, because the statute expressly says that it does not extend generally to cover every offense the witness may have committed, or may commit in the future, but only to such as are concerned in and disclosed by his testimony.

In *Brown* v. *Walker*, 161 U. S., 591, the Court said:

"The Act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of *general amnesty*, and belongs to a class of legislation which is not uncommon either in England (2 Taylor Ev., § 1455, where a large number of similar acts are collated) or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons

for offenses against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty" (161 U. S., 601).

"The distinction between amnesty and pardon is of no practical importance. It was said in *Knote* v. *United States*, 95 U. S. 149, 152 (24; 442, 443): "The Constitution does not use the word 'amnesty,' and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.' Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted." (Do. 602-3).

The Court further adopts the theory of pardon in reference to the statute in question in this hypothesis:

"If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided *directly or indirectly* by his disclosure, then if no such prosecution be possible—in other words, if his testimony operate as a complete *pardon* for the offence to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question." (Ditto 595).

And again: "The immunity extends to any *transaction, matter* or *thing* concerning which he may testify, which clearly indicates that the immunity is intended to be *general*, and to be applicable whenever and in whatever court such prosecution may be had" (Do 608).

In *Burrell* v. *Montana*, 194 U. S. 572, 578, this Court reiterated:

"It was held in *Brown* v. *Walker*, that the Act was virtually one of *general amnesty*, and the protection of the Constitution was fully accomplished by the statutory amnesty."

So in *Hale* v. *Henkel*, 201 U. S. 43, 67, the Court said:

"If the offense be outlawed or *pardoned*, or its criminality has been removed by statute, the 5th Amendment ceases to apply."

And the lower courts have adopted the theory of a pardon for the immunity statute, even while failing to apply it in practice—usually because the circumstances of the case did not permit. As in the case where an ex-witness sought to use his immunity to protect himself from prosecution, not for any offense disclosed by former testimony, but for "obstructing justice," by snatching papers from another witness in another proceeding; the Court saying:

"Complete *amnesty* is given any person so testifying in regard to such matters; but * * * it was the intention of Congress to limit this amnesty to a cause or proceeding based upon or growing out of an alleged violation (Brown *v.* Walker, 161 U. S. 591)".

U. S. *v.* Price, 96 F. R. 962.

The so-called Beef Trust cases unite in pronouncing the immunity an amnesty statute in theory, but neither follow this theory to its logical conclusion, and they differ as how the statute should be applied in practice.

In *U. S.* v. *Armour*, 142 F. R., 608, the Court held the immunity statute to be a *sufficient* substitute for the Protection of the 5th Amendment.

He went further and said it "might be broader but it could not be narrower." He went further:

"The immunity law is broader than the privilege given by the 5th Amendment, which the act was intended to substitute. *The privilege* of the Amendment permits a refusal to answer. *The Act* wipes out the offense about which the witness might have refused to answer. *The privilege* permits a refusal only as to incriminating evidence. *The Act* gives immunity for evidence of or concerning the matter covered by the indictment and the evidence need not be self-incriminating. *The privilege* must be personally claimed by the witness at the time. *The immunity* flows to the witness by action of law, and without any claim on his part" (142 F. R. 822).

U. S. v. *Swift*, 186 F. R. 1002; the other "Beef Trust" case, with the same facts as the last except that it arises on a motion to quash. Judge Carpenter began by following *Brown* v. *Walker* in holding the Act of February 11, 1893, to be a statute of amnesty:

"The Act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty. * * * Amnesty is defined by lexicographers to be an act of the sovereign power granting oblivion or a general pardon for a past offense" (186 F. R. 1002).

It is true the learned Court takes an inconsistent course, declaring the immunity statute to be a substitute and no more, that it is as broad as but no broader than the constitutional privilege, that the benefit of the statute is hedged in with the same conditions and limitations and difficulties, in acquisition and in operation, as the constitution. There was nothing in this, however, that indicated Judge Carpenter's intention to repudiate the amnesty theory of the statute; but merely

that he did not consider it applicable to after *committed* (not after discovered) offenses. On the contrary, he expressly adopts the assumption in *Brown* v. *Walker* that the statute should operate as a pardon:

"If, on the other hand, the object of the 5th Amendment be to secure the witness against a criminal prosecution which might be aided, directly or indirectly, by his disclosure, then if no such prosecution be possible—in other words, if his testimony *operated as a complete pardon* for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question" (Do. 1011).

In the *Wisconsin case, State* v. *Murphy*, 107 N. W., 470, there was a division of opinion, one part of the Court following Judge Humphrey in the *Armour Case* and the other part following Judge Carpenter in the *Swift Case*, just cited. The first opinion answered the objection here made, that an immunity, to be good, can only accrue to a witness who has first pleaded privilege on the stand:

"The statute in terms imposes no such limitation upon the immunity, for it assures it to any person who may testify, not who may be compelled to testify or who may testify after first refusing or protesting and asserting his constitutional right. Doubtless no criminal can immune himself by volunteering evidence without lawful demand. But a more obvious answer is that the law, giving the prosecuting officers and the investigating tribunal the power and right to demand the answer; the subpoena commanding attendance, the administering of the oath, and the putting the question, deprive the witness of any privilege to withhold the information, or to effectively protest, and notify him that the tribunal abso-

lutely demands the testimony. A declaration that he would like to assert that privilege if he had it, when by the very proceeding he is warned that he has it not, would be so entirely futile as to be puerile. What sense in his asking whether the information is insisted on when all the steps taken constitute most unambiguous insistence? Why assert a privilege when he has none?" (107 N. W., 473).

But the opinion of Mr. Justice Field in *Brown v. Walker*, not disputed by the other Justices in this respect, goes further in illustrating the effect of a pardon in practice:

"The statute undertakes, in effect, to grant a pardon in certain cases to offenders against the law, that is, on condition that they will give full answers to certain interrogatories propounded. It declares that the alleged offender shall not be punished for his offense upon his compliance with a certain condition. The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatever name the act may be termed. And a pardon is an act of grace" (161 U. S., 638).

Finally, it is undisputed that a remedial statute, such as this, should receive a *liberal construction*, to the end that its intent and purpose shall be carried out in the most efficient manner. And since this immunity statute will more effectually answer the purpose of its creation, if construed as a pardon, than if hampered by the conditions and restrictions appertaining to the constitutional privilege, it should receive the construction of a pardon in its mode of operation. We cite but one authority for the rule; once established, the only remaining question is, what construction will best effectuate the statute:

"In construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact. * * * While seeking to gain the legislative intent primarily from the language used, we must remember the objects and purposes sought to be attained."

Am. Tobacco *v.* Werckmeister, 207 U. S., 293.

POINT II.

The pardon or amnesty theory of the immunity statute affords a complete refutation (1) of every argument advanced by the Government, (2) of every ground for the opinion of the learned Trial Court, save one, (3) and of every ground assigned by the learned Court of Appeals without exception, in opposition to the plea in bar herein.

In our last point we tried to make it clear that the plea we have presented in bar to this prosecution is a plea of the immunity statute and not of the constitutional privilege; but our adversaries and the courts below have persisted in saying that what we have really pled is the constitutional privilege and not the immunity statute.

It will be seen that we make a distinction between the opinion at *nisi prius* and that of the

Court of Appeals. The Government's brief (we presume from its former arguments) and the Trial Court both take the narrow view of the extent of the operation of the immunity statute implied in the term "concerning." This is the solitary exception, which we refer to above as not covered by the "pardon" construction of the statute, and which is separately answered in our next point. The Court of Appeals, however, does not adopt this narrow construction of the term, but rather assumes the broad view to be correct that the immunity, if acquired at all, does extend to the sugar-weighing frauds, as something indirectly discovered or prosecuted by petitioner's former testimony, and hence "concerned" thereby; but the learned Court affirms the judgment below on an entirely different point, namely, the *non-acquisition* of the immunity in the first place, under an erroneous interpretation, as we contend, of the rule laid down in the *Wilson* case. This narrow view of the difficulty of acquiring the benefit of the statute is also answered, we claim, by construing it as a grant of amnesty or pardon, given to all witnesses, but especially to officers, agents and book custodians of large corporations, in consideration of a free and full disclosure from them (*post* Point IV).

The Government's arguments, followed by the Trial Court entirely, and partly by the Court of Appeals, are all based upon the theory that the statute is but an allotropic form of the constitutional privilege, whose sole office is to shield against self-incrimination, and is subject to the same conditions in acquiring it. They are summarized by District Attorney Stimson at fols.

716-9 of Record. This summary is substantially what was pleaded in the Government's replication to the plea in bar, and what has appeared, in protean shapes, throughout the Government's side of the case.

1st. That the immunity applies only to offences against the interstate commerce and anti-trust acts. This is in flat defiance of the immunity statute, and can only be maintained on the theory that the immunity serves only to bar the admission of the witness' own testimony in his subsequent prosecution, and since the testimony ostensibly concerns violations of the anti-trust laws, that such offences are the only ones for which the witness is exempt from prosecution. But when the immunity statute is treated as a general amnesty, this fallacy dissolves into thin air.

2d, 3d. That the testimony did not concern the crime for which Petitioner was indicted. We have answered this point, as thus stated, in our Point III. But the subsequent argument and the citation of the *Price Case* (Record, p. 243), show that the real point of the Government was to narrow the meaning of the word "concerning" in the statute so that it should mean, that the witness' testimony and the immunity concern offences only against the anti-trust laws. This argument also disappears when we regard the statute as a grant of amnesty instead of a rule of evidence to exclude the former testimony. That the learned District Attorney misunderstood the facts of the *Price Case*, which he cited, is shown, *post*, p. 62.

4th. That Petitioner gave his testimony voluntarily and without objecting or pleading the constitutional privilege. This argument is evidently based on the assumption that the acquisi-

tion of the statutory immunity carries the same condition precedent as the constitutional provision, that it must be pleaded in advance or waived. Such a condition is utterly inconsistent with the idea of amnesty.

5th. That Petitioner had already given this evidence in another proceeding, and had at all times placed all his information at the disposal of the government; which stands upon the same ground as the previous objection, and is completely answered by the amnesty theory of the statute, requiring no other compulsion than a subpoena.

Besides this summary, two other points have been raised by the Government during the progress of the case upon the question of *scienter*: first, that, if witness did not know of the sugar weighing frauds when he testified, he could acquire no immunity because it was impossible to plead privilege; and secondly, if witness did know, he is entitled to no immunity, because he was asking an "immunity bath." An interesting dilemma for Mr. Heike—but is removed by replying that amnesty statutes are passed for the very purpose of encouraging volunteer witnesses, and not to frighten them away with the requirement that they first confess their private sins.

The only other two arguments for the Government that we know of are those separately answered *post* points III and IV.

The Pardon theory of the statute refutes the manifold errors of the *Trial Court*. The gist of his decision is that it is a matter of *common sense* whether the witness should assert his privilege on the witness stand or not (1 Record, fols. 809-10); he follows *Reg.* v. *Boyes*, 1 Best & Smith, 329,

in holding that if the Court cannot perceive the danger the witness is in, it may compel him to answer (Do., fols. 810-11); he applies the decision of Ch. J. MARSHALL in the *Burr Case* to the statutory immunity enforcing a ruling that a witness may be compelled to testify to anything not a *link* in the proof of his own crime (Do., 801-2, 812); he charged that the absence of *scienter* destroyed the witness' immunity (Do., fols. 805-812); he charged: "The statute simply protects the defendant from *furnishing evidence* against himself, not others" (Do., fol. 806); he held that the witness in this case was obliged to assert his privilege if the investigation by the former grand jury revealed any material fact that might incriminate him (Do., fols. 808-9, 813-14); he charged that the fact that the witness was a volunteer was a critical point in the case (Do., fols. 807-8); he said the statute should receive a very strict construction because it relates to the guilty (Do., fol. 813). But none of these matters would be relevant, if the true theory of the statute be that it is a pledge of amnesty. The question is not what evidence can be offered against a former witness, but whether he is pardoned for an offense discovered by his testimony; this is not a case of *compelling* an unwilling witness, but of one who has voluntarily testified at the invitation of the Government, and under the protection of the statute, and the question is now whether the Government can go back on its pledge; it matters not whether the witness knows of the crime, and sees his own danger, because he has received plenary pardon. And the final charge of the Trial Judge, that no attempt was made to entrap the witness into confessing anything damaging to himself, shows that

he consistently upheld the theory that the immunity is merely a defense of the use of his own words against himself, and that he totally ignored the pardon theory of the statute (Do., fol. 815).

The views of the learned Circuit Court of Appeals which we question are traceable to the original error that the immunity statute is but a privilege against compulsory self-incrimination. The Court finds against the petitioner because facts he testified to were already known to the Government or could be ascertained without calling your petitioner to the stand (2 Record, p. 1644); such a reason would be entirely immaterial on the "pardon" theory. It finds that petitioner was not prosecuted on account of four checks he testified to at the Anti-Trust examination (Do., p. 1645); such a finding could only be reasonable on the theory that the immunity is limited to securing him against prosecution for the very offense prosecuted at the former inquest, to wit, a violation of the Sherman Anti-Trust Act; it is utterly inconsistent with the idea that the witness had received a pardon for every offense connected with or concerned in his discovery. It rules as irrelevant petitioner's testimony as to certain "sugar meltings" at the Havemeyer & Elder Refinery, and a summary of the total meltings produced by him (Do., pp. 1645-6), although it was by means of this evidence that the sugar weighing frauds, for which he is now prosecuted, were discovered and proved; not irrelevant, however, on the ground that such evidence did not "concern" the sugar weighing frauds, as the statute requires, for the learned Court says: "This statement was produced by Heike. On the trial of the indictment it was essential to show the true

weights of certain importations, and in order to enable the jury to determine what they were proof was made of the quantity actually melted at that refinery" (Do., p. 1645); but upon narrow, technical grounds drawn from the assumption that the statutory immunity is merely a substitute for the constitutional exemption from compulsory self-incrimination, and no more, and which can be availed of only under the same conditions. Thus, the only reasons suggested by the Court for excluding the "meltings" testimony as ground for immunity are: first, that the testimony was "volunteered"—but the object of the statute was to get people to volunteer in consideration of a pardon; and second, that petitioner was speaking as an agent when he testified, and therefore the evidence was not given by him but by his principal (Do., pp. 1646-7). This distinction, as already said, must have been deduced from the false assumption that immunity is merely freedom from compulsory self-incrimination; of course it would be absurd to offer it as an inducement to testify, if no benefit went to witness in person. It is not an analogue of the decision in *Wilson* v. *U. S.*, 22 U. S. 361, as the lower court erroneously assumes, for that case was construing the *power of compulsion*, under Amendment V, when a corporate officer is required to produce corporate books, while this case turns upon the effect of a *pardon given for producing them*, and the result would be, if the Court's contention prevailed, that the petitioner would have been immune if he had himself actually weighed the sugar and told about the frauds, but now he is not, because the actual frauds were perpetrated by other servants of the Company, and his evidence shows only the con-

structive participation of an officer of the corporation.

The authorities cited by the Government for its contentions, or those of the Court below, are not in point, if the immunity statute be treated as a statute of amnesty.

We have already given such authorities as we could find holding the statute to be a grant of amnesty operating as a pardon. We now cite the Government's authorities for the opposite contention, and show that, with three recent exceptions, they are all cases of witnesses on the stand, who have claimed the privilege given by the 5th Amendment on the ground that their evidence will incriminate them, and have been overruled on the ground that the statute will *shield* them equally well. This situation raises an entirely different question, and the decisions thereon have no bearing on the question of the effect of an amnesty and the extent and conditions to which it is available. These cases do decide that the statute is sufficient to guard the witness from self-incrimination in the same way the Constitution does; but how much further the statute goes, and in what different ways and degrees it protects the witness, are questions they do not even enter into.

U. S. v. Burr, 25 Fed. Cas. 1, 39-40, was cited by counsel upon one of their points concerning "*scienter*," namely, that witness cannot have the benefit of immunity unless he had "contemporaneous knowledge" of the crime disclosed by his testimony (1 Record, fols. 754-8). The utter absurdity of the deduction, as well as the irrelevancy of the case, will appear from a mere statement of the

circumstances. In the *Burr* case the witness was asked to produce a certain writing in cipher. He pleaded that it might help to convict him of misprision of treason. The Court compelled him to produce the evidence, because witness not being able to read *the cipher*, he could not be convicted by it of the misprision, which imports guilty knowledge. It is difficult to perceive the precise point on which the *Burr* case is here cited. There are cases holding that a witness, who is ignorant of the crime at the time, will not be deemed to have waived the after benefit of the constitutional privilege by not pleading it when on the stand; but this is evidently not what learned counsel mean, or they would have cited, not the *Burr* case, but some case in which the witness did know of the crime, did fail to plead privilege, and thereby waived and lost his constitutional immunity. As far as we can see, the point seems to be this: If a witness has no knowledge of the crime, he cannot plead privilege; if he does not plead privilege, he cannot avail himself of the contitutional immunity against subsequent prosecution; and if he has not thus entitled himself to constitutional immunity, he is not entitled to statutory immunity (Do. 754-6). But even if this argument were true, it does not show what bearing the *Burr* case has. In the first place, the ignorance of the witness in that case of the cipher letter has no bearing on *the point;* it might if Heike had pleaded the constitutional privilege on the stand, claiming that his evidence would tend to convict him of a crime to which personal ignorance was a perfect defense, and if it had been shown that he was thus absolutely ignorant. In the second place, the point has no bearing on *the case at bar;* this is

not a case of the validity of a privilege against self-incrimination, but of the validity of a pardon offered by Congress for the purpose of inducing voluntary testimony against monopolies and combinations in restraint of trade.

Ex p. Irvine, 74 F. R., 954, 960, is cited by the Government, in connection with the *Burr* case, to maintain the points: First, that although a witness pleads his constitutional privilege against self-incrimination, he may be compelled to testify unless the court apprehends reasonable *danger* of prosecution for crime involved (1 Record, fols. 750-2); and second, the point just discussed, that testimony cannot be refused by a witness who was ignorant of the crime at the time of commission, concerning a crime as to which want of knowledge is a perfect defense (Do. fols. 754, 759). In the *Irvine* case the witness had once carried a package of lottery tickets, but without criminal knowledge of the contents; he was therefore compelled to testify on the prosecution of his employers, solely for the reason that this lack of knowledge would prove a sufficient defense for himself if ever charged with participation in the lottery scheme. The effect of an immunity statute as a substitute was not considered, Judge Taft saying: "Under this decision (*Counselman* v. *Hitchcock*), Section 860, must be left entirely out of consideration in determining whether a witness is entitled to the protection of the Fifth Amendment to the Constitution" (74 F. R., 964). The *Irvine* case, therefore, was a case of compulsory testimony of a witness under the Fifth Amendment, and had nothing to do with the effect of an immunity statute as amnesty from subsequent prosecution.

U. S. v. *Kimball*, 117 F. R., 156, is cited by the Government (Record, fol. 739). That case is upon the familiar point, undisputed in cases concerning only the privilege of a witness under the Fifth Amendment, that a mere *volunteer* cannot claim the benefit of the constitutional guaranty; he must plead his privilege or he will lose it. Other cases to the same effect will doubtless be cited in Government's brief, not only on the point that *voluntary* testimony is unprivileged, but also upon corollaries, that the privilege *must be pleaded* by witness on the stand, that it will be *waived* if he does not, that *ignorance* of the crime involved is the only possible excuse for avoiding such waiver, and on the other hand that such ignorance *prevents* the privilege even more securely, because witness lacked the requisite knowledge to plead it, and, therefore, all questions of waiver and obviating waiver are supererogatory and out of the case—see adversary argument based on the fact that Heike had no knowledge of the sugar-weighing frauds at the time he testified, and the opinion of the Court at *nisi prius* (Record, fols. 689, 805-6) —and many similar points that serve to qualify and restrict the use of the privilege conferred by the Constitution. But, one and all, they have no bearing upon the effect of an amnesty statute. The immunity in this case is subject to no such restrictions; the statute says that it shall be conferred on any one who "*may testify* or produce evidence," not one who may be compelled to testify, or one who may testify after first refusing and asserting his constitutional privilege; there are no conditions to giving the testimony, it may be voluntary or compulsory; there are no limitations upon the immunity except that it extends only to

offences concerned in the testimony. There is not a word in these cases concerning the pardoning effect of an immunity statute.

U. S. v. *Price*, 96 F. R. 960, is cited by the Government for the very narrow view of the immunity, that it extends only to prosecutions for violating the Inter-state Commerce and Sherman Anti-Trust acts (Record, fols. 716, 727-9). The case does not approach any such point, but it shows how far it is possible to go astray in the absence of any definite ruling of this Court on the subject. Price had produced documents at a former inquiry into violations of the Interstate Commerce Law, but the case against him was for obstructing justice by seizing those papers from another witness in another proceeding. All the court held was that the immunity clause of Section 860 of the Revised Statutes does not extend to such a disconnected offense as that of obstructing justice at another proceeding. It is evidently through overlooking this fact in the case that our adversaries here apply the somewhat bizarre reflections of the court upon the possibility of a collusive witness immuning himself for all crime by procuring himself to be asked a few questions about a violation of the Interstate Commerce Law (96 F. R. 962). Judge Evans had no idea of excluding the amnesty of the statute from—to use his own words—"any cause or proceeding based upon or growing out of the alleged violation (*Brown* v. *Walker*, 161 U. S. 591.)" On the contrary, the only point held was: "If defendants were on trial for violating the Interstate Commerce Law, § 860 would clearly prohibit use of former testimony; but a plea in abatement to an indictment for conspiring to obstruct

justice does not raise the question" (96 F. R. 961). This is very far from ruling upon the effect of the amnesty statute. It is conceded on all hands that the subject matter of the subsequent indictment must grow out of or be concerned in the former testimony; but there is no ruling in the *Price* case, nor could there be, as to how far the amnesty does extend, except that an indictment for obstructing justice in another proceeding is not a matter growing out of or concerned in it; further the case saith not.

The leading cases upon the immunity statutes are all upon their sufficiency as a substitute for the constitutional privilege when the latter is pleaded by a witness on the stand. They do not absolutely hold that the immunity operates as a pardon, for that question was not directly in issue, but they give their opinion in our favor, as we have already quoted them. At any rate there is nothing in them to support the adverse view that the statute is not an act of amnesty, but a privilege subject to the same conditions as the constitutional privilege.

In the *Counselman Case*, 142 U. S. 547, a leading case, the court held that the immunity provision in R. S. Sec. 860 did not protect the witness from *self-incrimination* equally as well as the Constitution did; but it did not decide—for that point was not before it—how the immunity operated and how far it extended. So far as the *modus operandi* is concerned the exact language of the immunity is not the criterion; when the question is its sufficiency as a substitute, it is. And the mere determination of the sufficiency of the immunity statute does not determine its ef-

fect as a pardon. A pardon is radically different in operation from any guaranty against the use of one's testimony against himself. The *Counselman* case declares that one's own testimony cannot be used against him in any manner, shape or form; but a pardon declares that he shall not be prosecuted by *any* testimony or *any* means whatever. The case is silent upon this latter effect, the greatest practical question, of an immunity statute operating as a pardon.

Brown v. *Walker*, 161 U. S. 610; facts similar to the preceding case, except that the immunity statute pleaded by the witness was that of February 11, 1893, whose language is the same as that in the case at bar. The phrase, "no person shall be prosecuted * * * for or on account of any transaction, matter or thing, concerning which he may testify", was put in place of the phrase in Section 860, that no such evidence "shall be given in evidence, or in any manner used against him." This change of language was held to make a sufficient substitute for the constitutional immunity, when pleaded on the stand, for he could not be prosecuted by the use of his testimony any more than he could under the Constitution; but its effect as a pardon was not passed upon.

The Court did indeed establish its theoretical status as a pardon. It held that the Act of Congress was virtually an act of "general amnesty"; and that such amnesty statutes were of frequent occurrence—citing 2 Taylor on Evidence, §1455 (161 U. S. 601). It also said: "The distinction between amnesty and pardon is of no practical importance" (Ditto). But no attempt was made to determine what its effect would be as a pardon if applied to a subsequent prosecution. Mr. Jus-

tice Field does indeed forecast its future effect in his dissenting opinion:

"The statute undertakes, in effect, to grant a pardon in certain cases to offenders against the law, that is, on condition that they will give full answers to certain interrogatories propounded. It declares that the alleged offender shall not be punished for his offense upon his compliance with a certain condition. The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatever name the act may be termed. And a pardon is an act of grace" (161 U. S., 638).

But the prevailing opinion does not enter into this speculation. Without disputing what was said above by Mr. Justice Field, and affirming what was said in the *Counselman* case, and in the *Burr* case, as to the extent of the immunity, protecting witnesses from use of former testimony in any way, direct or indirect, the court based its decision, that the statute in question was a satisfactory substitute for the constitutional privilege, on the ground that the statute accomplished the object of the Constitution (161 U. S., 610); because "he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives tends to establish" (Do., 604). The Court uses the illustration that a witness cannot claim privilege if he has been *pardoned* for the offense concerning which he is asked to testify (Do., 599); while this is not a ruling upon the effect of the immunity statute as a pardon, it is upon the point that where liability for punishment has already been taken away, as by limitation of time, previous conviction or acquittal, repeal of statute, or prior pardon, the witness

cannot claim privilege because he cannot be prosecuted at all (Do., 598, 603).

Burrell v. *Montana*, 194 U. S., 572, was a case on the sufficiency of Section 7 of Bankruptcy Act of 1898 as a substitute for the privilege of the 5th Amendment: "But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding." The Court held that this provision "does not say that he shall be exempt from prosecution, but only, in case of prosecution his testimony cannot be used against him" (p. 578). It further implies that the statute, not exempting from prosecution, could not be called an act of "general amnesty," as the statute in the case at bar was called in *Brown* v. *Walker* (578-9). No question of the effect of the Bankruptcy Act immunity arose; the case turned upon the point that Burrell did *not object* to the introduction of his former evidence in bankruptcy proceedings at his subsequent prosecution for obtaining goods under false pretenses; it was as if we had not put in our plea in bar in this case and had not objected to the use of Heike's former testimony at his trial; the Court holding that said Section 7 of the Bankruptcy Act "does not declare a policy, the protection of which cannot be waived," but "it prescribes a rule of competency of evidence which may or may not be insisted upon" (578).

Jack v. *Kansas*, 199 U. S. 372, summarized the law on the subject:

"In *Counselman* v. *Hitchcock*, 142 U. S. 547, the immunity provided for by R. S. § 860 was held not to be broad enough to enable the prosecution to insist upon an answer from the witness. In the subsequent case of *Brown* v. *Walker*, 161 U. S. 591, the statute there involved was held to afford

complete immunity to the witness, and he was therefore obliged to answer the questions that were put to him, although they might tend to incriminate him."

It is cited by the Government on the wholly irrelevent contention that, even if a witness does disclose his crime in a State inquisition, under the protection of a State immunity statute, nevertheless he may be prosecuted in the Federal Courts, and *vice versa* (1 Record, 753). It does not touch upon the subsequent effect of the statute as a pardon.

Hale v. *Henkel*, 21 U. S. 73, affirming the doctrine of *Counselman* v. *Hitchcock* and *Brown* v. *Walker*, showed that those cases were regarding the *sufficiency* of the statute, for the purposes of a recalcitrant witness on the stand, rather than its *efficiency* afterwards, saying:

"The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. * * * If the offense be outlawed or pardoned, or its criminality has been removed by statute, the Amendment ceases to apply" (201 U. S. 67).

In the latest case, the Court says of § 860:

"The object of the statute is sufficiently plain. It was intended to give immunity as to subsequent proceedings to the one making discovery or testifying. But it was held to be inadequate, because it was not co-extensive with the Constitutional privilege."

Am. Lithographic *v.* Werckmeister, 221 U. S. 603, 611.

Foote v. *Buchanan*, 113 F. R. 156, 160, is cited by the Government on the point that the statute in question does not confer a general immunity on all witnesses, as the Constitution does, but a special immunity only on witnesses in Interstate Commerce and Anti-Trust investigations (Record, fol. 725.) But that is all the more reason for taking a broad view of the statutory immunity; it shows that it was a *special* inducement, held out in exceptional cases of gigantic trade combinations, where the overwhelming public interest was to procure information of the internal working of these combinations, as compared with the pretty prosecution of individuals, and therefore should receive a liberal construction, broader than the constitutional privilege against self-incrimination; the pardoning effects of the immunity should be extended, and restrictions upon its beneficial use should be removed, so far as the language of the statute will permit. Other than this, *Foote* v. *Buchanan* merely repeats the decision of this Court in *Counselman* v. *Hitchcock*, and has no application to the use of the statute as amnesty from prosecution.

The State cases cited in *Counselman* v. *Hitchcock*, 142 U. S. pp. 566, 585, are all cases of immunity statute pleaded in replication to witness' plea of constitutional privilege. The language varies, both of the constitutions and of the statutes, but this Court held that they were substantially the same in effect so far as the principle of the thing is concerned (142 U. S. 586). Some construe the constitutional privilege liberally and require that the statutory substitute should be equally broad, as in the Massachusetts, New

Hampshire and Virginia cases (Do. 571-2, 574-5, 576-7, 578); some construe the privilege strictly, and the effect of the statute is correspondingly narrow, as in the California and New York cases (Do. 568, 569-571). This Court approves the broad view of the former cases, and rejects the narrow view of the latter, adopting the rule given in *Emery's* case, 107 Mass. 172, 182:

"The witness is protected from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him" (142 U. S. 585).

But in all these States cases the question was raised by the plea of witness' privilege on the stand; none consider the effect of the statute as pardon; in so far as they consider the after effect at all, they differ only in following Ch. J. Marshall in the *Burr* case or in following Judge Denio in the *Kelly* case, *as to the use of the testimony given;* a pardon immunes from prosecution by any testimony or any means. That is to say, there is a distinction between ferreting out a crime and prosecuting for it. In the former case, the rule in the *Burr* case, the *Emery* case and the *Counselman* case protects a witness from the use of his testimony for the purposes of discovery; so far there is no difference in the operation of the 5th Amendment and an amnesty statute. In the latter case, however, that of subsequent prosecution, the 5th Amendment, and its statutory equivalents, protect the ex-witness from certain evidence only, his own testimony and other evidence discovered by means thereof;

while an amnesty statute pardons him absolutely for the *crime* discovered, the sole remaining function of the testimony being that it must show that it *concerned* the crime prosecuted, directly or indirectly. In none of these cases is there aught to sustain the Government's contention, or hostile to our own.

There are but three cases in which the witness has pleaded the Immunity Statute in bar to a prosecution.

U. S. v. *Armour*, 142 F. R. 808; a criminal prosecution under the Anti-Trust Act, one of the so-called "Beef Trust" cases. Defendants pled in bar testimony given at an investigation of the beef trust by the Department of Commerce and Labor, and consequent immunity by statute of February 25, 1903; a separate trial of the issue raised by plea, as in the case at bar. Judge Humphrey sustained the pleas as to individual defendants.

U. S. v. *Swift*, 186 F. R. 1002, the other "Beef Trust" case, with facts the same as the *Armour* case, except that it arose on a motion to quash.

State v. *Murphy*, 107 N. W. 470; special plea in bar of former testimony, constitutional privilege claimed, and a Wisconsin immunity statute offered by the Government, viz.: "But he shall not be prosecuted on account of any transaction concerning which he may testify." Here the court could have passed upon the policy of the statute, whether it was an act of *amnesty*, pardoning the witness absolutely for any offenses discovered, or whether it was a mere *rule of evidence*, excluding the use of the testimony given, in the same way and to the same extent that the Constitution does; but it did not embrace the opportunity. The

Court was divided, one part holding with Judge Humphrey in the *Armour* case, that the statute gave more immunity than the Constitution, and the other part holding with Judge Carpenter in the *Swift* case, that the statute gave the same, and under the same conditions and limitations, as the Constitution. Both opinions devote themselves to the question of the proper use of the testimony of a witness given in his subsequent prosecution, but neither discusses the question of the operation of a statute of immunity by way of pardon. The first supports our contention, that the immunity of the statute was offered as a special favor to induce witnesses to waive privilege and testify against certain obnoxious corporations and trusts (107 N. W. 473). The second opinion, much cited in the adversary brief, is devoted to whittling it down to a mere nullity, so far as inducement to testify is concerned, saying that the statute cannot operate unless privilege be first pleaded, and then only to exclude evidence given under actual compulsion. The more liberal judges controvert the necessity of a previous plea of privilege. All this would be immaterial if the statute were to operate as a pardon.

These are the only cases cited whose facts would permit them to act as precedents in the case at bar. In the first two, or "Beef Trust," cases, Armour and Swift gave evidence at an inquiry under the Anti-Trust Law; afterwards they were indicted for violating that law; they pleaded in bar immunity by statute of February 25, 1903; the plea was tried separately and motions made to direct verdict. *State* v. *Murphy* was a similar case of a trial of a plea in bar of an immunity statute, except that the statute was the Wisconsin statute. In the *Armour* case, Judge Humphrey

took a broad view of the statute, following the lines of the *Burr* decision as far as they will go; he held that the immunity of the statute is broader than that of the 5th Amendment, and that the constitutional privilege need not be first claimed in order to set the statute of immunity in operation, the latter "flows" of its own motion. In the *Swift* case, Judge Carpenter took the narrow view; he held the statute as broad but no broader than the constitutional privilege, that the privilege must be pleaded before the statute can begin to operate, and that when it does operate, its effect is no more than to protect the ex-witness from the use of his own words to criminate him. In the Wisconsin case (*State* v. *Murphy*) the court was divided, one side following the opinion of Judge Humphrey in the Beef Trust case, the other that of Judge Carpenter—it is impossible from a casual reading to tell which was the majority opinion and which the minority. But while these three case afforded an opportunity to pass upon the unsettled question of the influence of the immunity statute as a pardon, the opportunity was not embraced. The only point they agreed upon is that the statute is a *substitute* for the constitutional privilege—which it is not, if our pardon theory be anywhere near correct—and the points they disagreed upon concerned merely the use of witness' own testimony. But a pardon in operation is a much broader agency than the use of testimony; it gives freedom from prosecution by any means, by means of his own testimony or any one's else; and no such question is discussed.

It would seem to follow from this review of cited cases, that there are *no cases* to support the contention of the Government that the immunity statute of 1903 is merely a defence against self

incrimination, requiring to be pleaded as a privilege, and extending no further than the exclusion of testimony given; nor anything against our contention that the statute grants *general amnesty* to witnesses, as this Court has said, operating in every case to which it is applicable, *ex proprio vigore* as a pardon does.

POINT III.

The Petitioner's former testimony was "concerning" the "transaction, matter or thing" on account of which he is being prosecuted, within the meaning of the Statute; although the particular offence for which he has been indicted was not the direct subject of the Inquiry at which he testified, yet it was incidentally discovered, led up to and prosecuted by means of his testimony.

This is the great practical question in the case. Can a witness who testifies concerning one offense be prosecuted for another offense incidentally discovered thereby?

We use word discovery throughout as furnishing testimony leading directly or indirectly to the *corpus delicti*, or a link thereof, or to evidence used for finding or prosecuting the same. Hitherto we have argued only to establish the preliminary point, that the statute operates as a pardon; that will suffice to answer every question raised

by our adversaries or the court below, save *one*. It will afford a complete refutation of the argument that the statute is merely a substitute for the Fifth Amendment, no broader, and subject to all the requirements and conditions that hamper the acquisition of that privilege. It completely refutes the argument that the statute operates merely as a rule of evidence excluding the use of former testimony for purposes of prosecution. But it leaves undecided the vital question, how far the immunity extends; does it cover a new offense, discovered or springing out of or led up to by the inquiry; or is it confined to a prosecution for the very offense concerning which he directly testified?

The determination of the first point, that the immunity statute operates as a pardon, will not determine the second question of the offenses to which the immunity extends; for it is not pretended that giving evidence will pardon every offense the witness may have committed, but only those "concerning" which he testified.

It is evident that the term, "concerning," must bear a technical meaning in this statute, for if it be construed in all its strict literalness, the statute would be practically nullified and its purpose and intent wholly frustrated. Strictly speaking, the witness was testifying concerning violations of the Anti-Trust Act; but if it were the law that that was all his immunity covered, and that he could still be prosecuted for all his private offenses, not only those directly exposed but also those indirectly discovered or led up to his testimony, what good would it do the witness? Who would come forward and make a full disclosure in answer to such an inducement as that? The term

should receive the broadest construction; it should be extended as far as possible. And on this point we feel at liberty to cite all the old authorities upon the broad extent of the constitutional immunity; for while the Constitution merely excludes the use of the testimony witness gave, and the statute amnesties from prosecution by any means, yet the extent of the immunity is subject to the same limitation in either case, that the offense prosecuted must be "concerned" by the witness' discovery.

I. The Lower Court's Findings on the Question.

The sugar-weighing frauds, the subject of indictment, were discovered, and evidence to prove them was found through the use of a table of "sugar meltings," the actual weight of the sugar imported, by comparing it with the fictitious weights of the same sugar turned in to the customs officials. It was Heike who produced this table, when a witness in these grand jury investigations of the Sugar Company. The question is, did this testimony and this document concern the discovery of the sugar frauds, for which Heike was indicted, within the meaning of the immunity statute? The finding of the Court of Appeals apparently settles the question:

"There was furnished to the second grand jury a statement giving actual meltings of each company operated by the American from 1887 to 1907, showing the pounds of sugar melted each year in each refinery, which included the amount melted by the Havemeyer & Elder Refinery for the period covered by Heike. On the trial of the indictment it was essential to show the true weights of certain importations, and in order to enable the jury to determine what they were, proof was made

of the quantity actually melted at that refinery" (2 Record, p. 1645).

The Court also considered the other testimony and documents produced by Petitioner when under examination as epitomised *ante* pp. 17-8, and some of which are explained in Mr. Heike's statement in Part II of this brief (2 Record fols. 4931-4).

The Court found that his testimony of the history of the Sugar Company and his relation to it was not competent, because it was taken from the company's records and could have been obtained by the Government from other sources (fols. 4930-2). But that was error; the question here is not whether Heike's testimony was a *sine qua non*, and whether the same evidence might have been got elsewhere, but whether he gave this testimony and it was concerning the sugar-weighing frauds. The frauds could not be prosecuted without the history in question; it was a part of the prosecution; and it matters not whether his evidence was used or not; he had testified concerning the frauds.

The Court also found that he had proved his signature on four cheques in one of these former anti-trust inquiries, and it was necessary to prove the signatures on four other cheques, charged as overt acts in the 6th count of the indictment (2 Record fols. 4932-4). And while they might not serve as basis of comparison in a criminal trial, yet the witness had testified concerning—he had furnished a *clew* to the discovery of crime afterwards prosecuted.

And the Court found that Petitioner had furnished the evidence of the meltings, which the District Attorney called for in the anti-trust proceeding (1 Record p. 946), and which were so useful

to the subsequent prosecution of the sugar frauds (2 Record fols. 4935-6).

But while the learned Court of Appeals thus found that of relevancy, it did not pass upon the question of mutual "concern" of testimony and offense within the technical meaning of the statute. It says:

"The argument as to the precise measure of immunity secured by the statute has been quite extended, and a construction of the Act contended for which we do not find it necessary now to pass upon" (Do., p. 1644).

The reason which the Court gives for overruling the plea, notwithstanding the finding that Heike's testimony essentially concerned the discovery of the offense for which he was indicted, is that Heike was compelled to furnish the table of weights, so useful to the prosecution by virtue of his corporate duty, under the doctrine of *Hale* v. *Henkel* and *U. S.* v. *Wilson*, already discussed (*ante, p.* 34), and therefore he was not entitled to any immunity for anything. Those cases do indeed hold that a corporate officer can be compelled to testify in such circumstances; but there is nothing in them, or in the language of the statute, that suggests that such officer loses his immunity because he performed a duty to his corporation as well as to the state (*post* Point IV).

Wherefore, the meaning of the term in question still remains for this Court to decide.

2. The word "concerning" should receive the broadest possible construction.

We have elsewhere contended for the proposition that the immunity statute should receive a liberal construction because it operates as a par-

don, an act of sovereign grace, and that it should prevail in a conflict with the revenue law because the latter is punitive in its nature—although our learned adversaries make the opposite point that a punitive statute should receive a more liberal construction than an immunity because the latter is "in derogation of the sovereign power to punish." But there is a special reason why an immunity should receive a liberal construction in respect to the *extent* of the offenses it applies to; if it be confined to the very offense under investigation, violation of the anti-trust and monopoly law, it would be practically worthless; for it is seldom that witnesses personally, but usually great corporations, violate this law. But if the proffered immunity extend to everything that can possibly be found against the witness personally, in his testimony or in the books he produces, it would then prove a valuable inducement to testify. A witness is asked to give information concerning a trust or monopoly; he says, or thinks: "I would like to, but I am afraid of personal prosecution; there is evidence in the books I shall have to produce of a secret offense for which I am personally responsible—not the offense you are investigating—something that has nothing to do with violating the anti-trust and monopoly law—embezzlement, or swindling, or peradventure aiding and abetting a sugar-weighing fraud—now secret, but exposed to discovery by this investigation," or he may say: "I do not know of anything wrong in the books themselves, but they may lead to the discovery of something outside for which a charge may be brought against me. I am perfectly safe now, and don't like to run any risk." To this the Government says in effect: "Rest assured that you

will be personally safe, however far your disclosure extends; the statute says you shall not be prosecuted on account of any transaction, matter or thing concerning which you may testify or produce documents; there is no exception; and 'concerning' means that you are to become immune from prosecution for every private 'transaction, matter or thing,' provided only it be disclosed directly, or discovered indirectly, or its prosecution be assisted in any way, by your testimony." Such an assurance must be read into the statute whenever it is used, in order to carry out its purpose.

No one will dispute that the discovery comes within the scope of the immunity statute in the following illustration of Mr. Justice Shiras:

"In the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute, but a full disclosure of all the attendant facts —and if he testify at all he must answer fully— might disclose that the witness had been guilty of embezzling the monies intrusted to him for that purpose; or it might have been disclosed that he had made false entries in the books. . . . These acts would be crimes . . . for which he might be indicted and punished, and he may have furnished by his testimony . . . the very facts or clues which led to his prosecution."

Brown *v.* Walker, 161 U. S. 623.

Nor will any one dispute what Mr. Justice Field said in the same case:

By the 5th Amendment a witness "is not only protected from any incriminating *testimony* against himself relating to the offense under investigation, but also relating to any *act* which may lead to a criminal prosecution therefor."

"The constitutional guarantee is not fully secured by simply exempting the witness from prosecution for the *designated offense* involved in his answer as a witness. It extends to exemption from not only prosecution for the *offense under consideration*, but from prosecution for *any offense* to which the testimony produced may lead."

Brown *v.* Walker, 161 U. S. 630, 631.

That the word in question, "concerning," must be extended beyond its primary and literal sense, is shown by the synonymous expressions that are used by the courts to explain it. Thus Mr. Justice Field, in the above quotation, says: "Any offense to which the testimony *may lead*" (161 U. S. 631); the majority opinion uses the expressions: "the offense to which it (the testimony) *relates*," "prosecution which might be aided, *directly or indirectly*, by his disclosure" (Do. 594, 595), and "criminal case which the evidence which he gives *tends* to establish (Do. 604), and that the words, "any transaction, matter or thing concerning which he may testify, clearly indicate that the immunity is intended to be *general*" (Do. 608).

In the *Counselman* case the Court uses the term "*perils*" of the witness, and "offense to which the question *relates*," as expressive of the reach of the immunity (142 U. S. 586); and in the *Baird* case, this Court states the required relation between testimony and discovery to be simply that of cause and effect, thus: "The Act as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate *because* of testimony given in pursuance of the requirements of the law" (194 U. S. 45); and regarding the statutory immunity as a pardon, as it should

be, "it extends to every offense known to the law" (*Brown v. Walker*, 161 U. S. 601).

The operation of an immunity law has a double aspect; it bars any *evidence* discovered by means of the original testimony given by the witness, and it absolves him from any *offense* discovered by the same means. But the question of relevancy, the meaning of the term "concerning," is the same in both cases; surely if the testimony given "concerns" new-found evidence, it also "concerns" a new-found offense. And for this reason the old cases excluding newly-discovered evidence are equally applicable, so far as the degree of relevancy is concerned, to newly-discovered offenses.

Thus, all that Ch. J. Marshall said for a liberal interpretation of the constitutional immunity applies as well to the offense as to evidence discovered.

"It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which would be punishable by law."

The word "part" in this quotation was intended to mean a link in the chain of proof, as the context shows; but there is no limit upon the offense immuned except that it be "punishable by law."

U. S. *v.* Burr, 25 Fed. Cas. 40.

So this Court, in overruling the sufficiency of an immunity statute that merely prohibited the giving in evidence of former testimony or using it against the witness, said:

"This, of course, protected him against the use of his testimony against him or his property, in

any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

And again: "The object was to insure that a person should not be compelled, when acting as a witness in any investigation to give testimony which might tend to show that *he himself had committed a crime*" (no qualification as to kind of crime).

Counselman *v.* Hitchcock, 142 U. S. 564, 562.

Brown *v.* Walker, 161 U. S. 594, 618, 619.

And what applies to evidence applies also to the offense, we claim, discovered and prosecuted. So this court held that self-incrimination, under the 5th Amendment, means "to give testimony which may possibly *expose* him to a criminal charge"; that is, it must be exposed or discovered in some way by the witness, but further than that, there is no connection, or "concern," required with the offense immuned.

Hale *v.* Henkel, 201 U. S. 67.

This Court has approved an English ruling, "as an argument of utility," that an unwarranted search, and by the same argument, compulsory

testimony, "is a *means of* detecting *offenders* by discovering evidence."

Boyd *v.* U. S. 116 U. S. 616, 629.

And the rule of chancery, "never to decree a discovery which might *tend* to convict the party of *a crime*, or to forfeit his property," is based on the same principle, to protect or immune from prosecution for any offense, or by any evidence, thereby discovered.

Boyd *v.* U. S., 116 U. S. 631-2.

The rule of this Court is: "That constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy."

Boyd *v.* U. S., 116 U. S. 635.
Brown *v.* Walker, 161 U. S. 616-7, 635.

And the same is true of the word "concerning," or any other beneficial term, in a substituted immunity statute. In the *Counselman* case this Court categorically disapproved of those State cases, as *People* v. *Kelly*, 24 N. Y. 74, contending for a narrow construction of the offenses to which the witness' discovery extends, and affirms those taking the liberal view. It expressly approves the Massachusetts rule, in case of such immunity:

"It protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical pur-

poses, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself."

Counselman *v.* Hitchcock, 142 U. S. 574-5, 585-6.

It also approved a Virginia decision, that an immunity was not extensive enough, which permitted:

"That, without using one word of that statement, the attorney for the Commonwealth might * * * be led by the testimony of the witness to means and sources of information which might result in criminating the witness himself" (Do. 577, 586).

The *Counselman* case also approves this ruling of the New Hampshire court as to the proper extent of immunity:

"That he shall not be required to disclose * * * facts that can be used against him as admissions tending to prove his guilt of any crime or offense, of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission or of his connection with it may be obtained" (Do. 578, 586).

Reviewing these cases the New York court said on this point:

"The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with *any* criminal offense of which he may then or afterwards be charged, or the sources

from which or the means by which evidence of its commission or of his connection with it may be obtained."

People *v.* Forbes, 143 N. Y., 219, 228.

In the latest case on the subject, the Court says concerning § 860:

"The object of the statute is sufficiently plain. It was intended to give immunity as to subsequent proceedings to the one making discovery or testifying. But it was held to be inadequate, because it was not co-extensive with the constitutional privilege."

Am. Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 611.

That is to say, the immunity applies to any "proceedings," provided it be subsequent and against the witness, not merely to a proceeding concerning the subject-matter of his former testimony. Nothing is said as to the meaning of the word "concerning" in the special sense we are discussing, because the word is not used in § 860; that statute speaks only of putting in evidence or otherwise using former testimony of the witness—of course, if the question be whether or no certain testimony can be used in a certain proceeding, it would be useless to provide that the testimony must concern the proceeding, for that follows *ex rei natura;* but if the statute had been about prosecuting offences, instead of about using testimony it would have been construed, by a parity of reasoning, to apply to any crime or offense springing out of the discovery made.

The Court was but applying the rule laid down in a former hearing of the same case:

"In construing a statute we are not always confined to a literal reading, and may consider its

object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate, rather than destroy, the spirit and force of the law which the legislature intended to enact. * * * While seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained."

Am. Tobacco *v.* Werckmeister, 207 U. S. 293.

(3) Whether or not the immunity statute should receive a broad application is a political question, and the policy adopted by Congress is final and binding on all.

Public policy is a political question, and it is the province of Congress, in the first place, to determine the public policy of every statute it enacts.

In *Pennsylvania* v. *Wheeling,* 18 How. 440, Mr. Justice McLean said:

"The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of *public policy;* the former by the pleadings and evidence in a case."

The Constitution prescribes this distribution of governmental power; Congress to declare the *sovereign will,* the Courts to interpret the statute in applied cases:

"A sovereign decides by his own will, *sic volo, sic jubeo.* A court decides according to the law prescribed by the sovereign power."

R. I. *v.* Mass., 12 Pet. 737-8.

And if there be no ambiguity in the statute, it is binding on courts as it is on other citizens. In all political questions, said Ch. J. Taney:

"The decision of Congress is as binding on every other department of the government, and cannot be questioned in a judicial tribunal."

Luther *v.* Borden, 7 How. 42.

And changing the language, which concerned the action of the executive department in another political question, to suit the case of the law-making power, the Court added:

"And in this view it is not material to inquire, nor is the province of this Court to determine whether Congress is right or wrong. It is enough to know that, in the exercise of its constitutional functions, it has decided the question. Having done this under the responsibilities which belong to it, it is obligatory on the people and government of the Union."

William *v.* Suffolk, &c., 13 Pet., 420.

Ch. J. MARSHALL: "It is the province of the Court to conform its decision to the will of the legislature, if that will has been clearly expressed."

Foster *v.* Neilson, 2 Pet. 253.

Of course, the Court has power to *interpret* the public policy of every statute, as part of the statute, in specific cases of individual rights; but that power is limited to determining the validity and applicability of the statute, and nowise questions its policy.

Head Money Cases, 112 U. S., 598. U. S. *v.* Rauscher, 119 U. S., 418-9.

We have been thus elaborate on this trite subject because our learned adversaries are con-

stantly insisting that the immunity statute is bad policy, and should receive a strict construction and a narrow application for that reason. For example, the Government protests that, with a liberal interpretation, guilty parties would rush to the stand to gain an "immunity bath;" but Congress has determined that the requirement of a subpœna is sufficient security against such abuse, and that to go further would deter valuable witnesses from coming forward—which is the prime consideration of the law. Again it is claimed that a liberal application of the law will hinder the Government in its work of prosecuting criminals; but Congress declares that that is a matter of minor importance, that inside information of the trust system is the main object, not punishment of individuals. Again the Government complains that a free immunity policy would interfere with the enforcement of the revenue laws; but when the policy behind two statutes conflict, Congress has the prerogative of deciding which shall prevail, and it has decided in favor of the immunity statute in this contingency. Again our adversaries have attacked the fundamental policy of the immunity statutes *on the ground of immorality*, as savoring of the nature of a "bribe" to witnesses; they ask for the strictest construction of the Government's pledge of immunity, and even offer to repudiate it altogether after defendants have acted on it, as a rebuke to Congress for instituting such an immoral inducement to witness—citing *State* v. *Murphy*, 128 Wis., 218 and Judge Martin's charge (1 Record, fols. 812-3). Our sole reply is that all such arguments should be addressed to Congress, and not to the Court. Besides, we do not think this sort of "morality" will ever prove popular except

with despots. Of like import is the Government's point—the first in the brief below—that the whole policy of the immunity statute should be overturned by the Court, or at least strictly construed, as "in derogation of the sovereign right to punish." The entire Bill of Rights is in derogation of the sovereign's right to punish citizens, but we have always understood it entitled to the most liberal construction for that very reason.

There is nothing in the terms of the statute that indicates an intention to except any crime discovered, directly or indirectly or incidentally. It provides that a witness shall not be prosecuted for any crime discovered; it does not add, "except crime against the revenue." There is a public policy requiring punishment of every crime, and if revenue frauds were excepted from immunity, so would be every other crime or offense for the same reason. The immunity is clothed in the most plenary and unexceptional terms: "shall not be prosecuted for or on account of any transaction, matter or thing concerning which he may testify or produce evidence"—clearly indicating, as this Court has held, that the immunity granted was intended to be "general".

Brown *v.* Walker, 161 U. S. 608.

Said Mr. Justice Bradley: "The immunity was founded upon principles of *public policy* and a just regard to the liberties of every citizen."

U. S. v. Collins, 25 Fed. Cas. 550.

And Mr. Justice Field, after citing the foregoing words, added:

"And we have no sympathy for the efforts of any individual or tribunal to weaken or fritter

away any of the provisions of the Constitution, even the least, intended for the protection of the private rights of the citizen."

Brown *v.* Walker, 161 U. S. 637-8.

And all that may be said in favor of a broad construction of the 5th amendment applies with equal force to the statute of immunity, with this addition that the statute pledges the *sovereign honor*, for which the witness gives good consideration—his testimony. And regarding this very statute, we adopt the language of Judge Humphrey, in replying to the contention that the sovereign duty to punish the guilty might be impeded by this grant of immunity:

"The answer to this contention is that the primary purpose of the act is to correct defective legislation (secure information), and if the additional purpose be the prosecution of offenders, such additional purpose is clearly secondary."

U. S. *v.* Armour, 142 F. R. 826.

(4) The pleadings, on the plea in bar, afforded sufficient evidence on the question of relevancy to make it error to direct the verdict on the special trial of the plea.

POINT IV.

The learned Court of Appeals erred in holding that Petitioner was entitled to no immunity because he was subpoenaed and testified as an officer of the corporation under investigation at the anti-trust proceeding, where he gave the evidence he now relies on.

At the trial, and in arguing the writ of error, the objections to the claim of immunity were divided into two heads: 1st, that Petitioner had not complied with all the conditions that are required of a claimant of the privilege of witnesses under the Fifth Amendment; 2d, that the immunity did not extend to the particular offence for which Petitioner was indicted. But when the Court of Appeals came to consider the case, it discarded both of these grounds, either by concurring with the Petitioner's views on those points or by ignoring them as immaterial or superfluous, and overruled the plea in bar on a new point of its own invention, namely, that the immunity statute does not apply to officers or agents making discovery in behalf of their corporations.

For that reason, we say, if this Court concludes that the learned Court of Appeals erred on the particular point on which it based its decision, the judgment reviewed must be reversed; for *non constat*, if the learned court had not placed its decision upon the special ground it did, but had considered all the grounds for that purpose which it ignored or assumed in our favor, but it

would have decided all those questions in our favor—both that Petitioner had complied with all the conditions precedent required by the immunity statute, and that the immunity itself extended to the indictment—and that it would have reversed the judgment of the Circuit Court with directions to sustain the plea in bar; and the Petitioner should not be deprived of the advantage of the modified opinion of the learned Court of Appeals, after this Court shall have corrected the error in the special point on which that Court placed its decision, even though this Court may think the lower Court might have better founded its opinion on one of those rejected points.

The decision of the Court of Appeals sets forth the two inquiries into violations of the Sherman Act by the Sugar Trust, and subpoenas directed to Petitioner, as secretary of two Sugar Companies, as alleged in the plea, and that "he obeyed these subpoenas, testified before these grand juries, and produced various records and papers of the two companies" (2 Record, fols. 4928-4930). The Court then mentions some of the testimony given, including the vital table of meltings, frequently referred to herein. Then it refers to a ground for avoiding the effect of the immunity, much made of by the Government, that the statement was "volunteered" by Petitioner—that is, although the "meltings" testimony may have led straight to the indictment, yet it conferred no immunity because witness was not compelled to produce it against his will, but did it voluntarily. The Court said on this point:

"The government contends that this statement of total meltings was volunteered by Heike, and there is some uncertainty as to just how it was furnished. We disregard this, however, and will

assume that the grand jury subpoena called for just such a statement, and that it was furnished to the grand jury in response to such a call" (Record, fol. 4936).

The learned Court then proceeded to avoid the immunity on another theory—which we think erroneous—that a witness who testifies on behalf of the corporation being investigated can obtain no *personal* immunity by the statute:

"It seems to us, however, that this statement was not in any true sense 'testimony given' or 'documentary evidence produced' by Charles R. Heike before the grand jury. Personally he knew nothing about the meltings and could himself give no competent testimony. As an officer of the company he could require its clerks to prepare such statement from the records, which the grand jury already had under the subpoena *duces tecum*. The weighers who noted the scales and called off the readings, the checkers who recorded the amounts, the clerks who transcribed such records in the books, the corporation which had such weighings made and which preserved the records of them, the clerks who subsequently tabulated these records may fairly be said to have contributed, each of them, testimony essential to proving that the tabulation was an accurate statement of the total weighings, but we cannot see that Heike had anything to do with it, except to inform the last series of clerks that the corporation which employed them wished them to make such a statement. When it was thus made up by the corporation, it certainly would be a matter of no importance whether it was actually transported to the grand jury room by one officer or employee or by some other one. The distinction between a corporation and its officers has not always been closely adhered to, but such distinction is accentuated in *Wilson* v. *U. S.* (U. S. Supreme Court, May 11th, 1911), where it is held that the subpoena *duces tecum* may properly be addressed directly to the corporation. The

statement of meltings being a document prepared for the grand jury by the corporation and which the corporation under the subpoena was obligated to turn over to the grand jury, no matter which officer had the immediate custody of it, we fail to see why the performance of that corporation obligation to deliver the document by one of its officers can give him personal immunity in regard to anything which such statement, to which he has contributed nothing, contains.

The assignments of error which deal with the disposition of Heike's special plea are therefore overruled (fols. 4939-9).

We assert, with deference, that the theory the learned Court has here drawn from the *Wilson Case* is a false deduction. It can only have been reached, we think, by an erroneous but common process of legal reasoning which consists in substituting opinions of the Supreme Court in place of statutes they were endeavoring to interpret, making stray sentences and misunderstood dicta of the former the original source of light and law instead of the statutes themselves.

The statute bears on its face no such meaning as the learned Court has imparted into it *via* the *Wilson Case*. It says: "No *person* shall be prosecuted"—that is, no person who "may testify or produce evidence, documentary or otherwise." How could a provision be made broader or more liberal? Corporations, indeed, have been deprived of its benefits by the amendment of 1906; but so far as natural persons are concerned, it applies to all—the sole qualification being that it applies to all persons who *may* testify. It matters not how he testifies, or why he testifies, or in what capacity he testifies; if he be a natural person, he acquires his *personal* immunity. If he testifies on his pri-

vate behalf he clearly acquires personal immunity; and if he testifies on behalf of a corporation, he acquires personal immunity with equal clearness, so far as the statute goes. The opposite notion that a witness acquires no immunity from testifying as an officer of a corporation seems to be taken as a corollary to the line of authorities holding that an officer can be compelled to produce documents and testify against the corporation to which he belongs. But a witness can be compelled to testify against himself personally; and if he does not thereby lose his immunity, how can he when he testifies against his corporation? A witness cannot plead privilege on behalf of his corporation, to excuse himself from accusing the corporation, because a corporation is entitled to no immunity in any case. But the *personal* immunity of the officer is secure when he testifies against his corporation, as well as when he testifies against himself in person. If there were any such metaphysical abstraction as corporation personality distinct from natural personality—a sort of platonic ideal of a corporate officer—perhaps it might be excluded from the benefit of the immunity statute along with his corporation; but every flesh-and-blood officer of a corporation is sure of his personal immunity, although he cannot secure immunity for the corporation, no matter whether he testifies on his personal account or on behalf of the corporation. It certainly would be an odd construction to give to an amnesty statute, plainly declaring that any one who "may testify" shall receive personal amnesty for every "matter or thing" disclosed by his discovery, to hold that the amnesty shall apply when he discloses his private affairs, but not when he dis-

closes his company's affairs, although the latter disclosure is the chief object of the law. We think the learned Court must have erred, either from too little study of the statute itself or from misapprehending the meaning of the decision it relies on.

The construction given by the learned Court of Appeals would subvert the whole public policy behind the Immunity Statute. We have already spoken of the public policy several times in this brief; it is notorious and needs no citation of authorities from us. Substantially, a wave of popular sentiment sprang up in the eighties against mammoth trusts and combinations, secret in organization and methods, and the Interstate Commerce and Anti-Trust laws were the result. The greatest obstacle to be overcome was the difficulty of procuring inside information, and the Immunity Statute was the result. The object of Congress, it is obvious, was not to punish individuals—at most that was secondary—the prime object was to pierce the *penetralia* of the great corporations, so that the Government could gain *inside* information on which to proceed against them and enforce the law—without which it could not act. But it wished to proceed against corporations, trusts and monopolies, not against individuals. The witnesses most sought after were the officers, agents and employees who knew and could reveal the inside workings of their corporations. What good would an immunity provision do, with such a limitation as the Court of Appeals annexes? Practically none.

When an officer or agent takes the stand to give evidence against his corporation for violating the anti-trust law, the chief deterrent to a full disclosure is the *unknown* dangers that may befall

him personally. He knows he has not violated the anti-trust acts personally; but there may be offences hidden in the company's books—transactions perhaps he knows naught of—involving him personally. He fears to reveal them on account of these secret and collateral "perils"—as Ch. J. Marshall called them. But if assured that he is entitled to personal amnesty, not only for the offences of the corporation, but also for any private offences his testimony may reveal—not only those it directly discovers, but any other for which it may afford a *link* of evidence or a *clew* to discover—he will testify freely and unafraid; otherwise he will remain dumb. It is no answer to say that he may be compelled to testify in that particular case; the aim of the statute is to secure free and willing witnesses, and that can be best accomplished by offering him complete *personal* amnesty for everything he discovers.

Nevertheless the learned Court held that the petitioner gained no immunity—admitting that his evidence led to the discovery and proof of the offense for which he was indicted—on the sole ground that he was an officer and agent testifying against his corporation in the way the law intended. Such a ruling, we contend, would frustrate the very aim and design of this immunity statute; for what inducement would it be to any corporate officer or agent to testify hereafter, if informed in advance that he will gain no immunity whatever, either for his corporation or for himself personally! Therefore, we contend, the learned lower court must have misinterpreted the decision of this Court on the subject.

The first decisions were upon the question arising when an officer or agent, called to testify

against his corporation, claimed the witness' privilege of the Fifth Amendment, on the ground that the testimony he was called upon to give would incriminate the corporation. No personal privilege was claimed in this class of cases, and no question of personal privilege or personal immunity was involved; for the witness had committed no personal offence, and the only one that could be prosecuted was the corporation. Such vicarious pleas have been of frequent occurrence, but we have never heard of their being accepted by the law. It has always been a part of the ancient doctrine of constitutional privilege for witnesses, that it is *personal*, that it cannot be pleaded on behalf of another, corporation or man; the witness himself, and no one behind him, is protected by the Constitution, nor for the same reason by a statutory substitute.

State *v.* Nowell, 58 N. H., 314.
Brown *v.* Walker, 161 U. S., 602.
Hale *v.* Henkel, 201 U. S., 69-70.

Hale v. *Henkel*, 201 U. S., 73; Hale refused to testify against the Tobacco Trust on the ground that it might incriminate himself; the evidence called for concerned the corporation of which he was an officer, but not himself personally; the Court held he was not entitled to any privilege under such circumstances: "The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person" (201 U. S., 69-70). Then finding that criminal charges were directed against the

corporation only, it ruled the privilege out, saying: "The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a ground for refusal to produce its books" (Doc. 75). We admit the authority of this case. Of course Heike could have been compelled to testify against his corporation. So he could have been against himself. The corporation would have gained no immunity in either case. All we claim is that Heike would have gained personal immunity in either case. The Court of Appeals held he gained no immunity in the former case.

Wilson v. *U. S.*, 221 U. S., 361; a case of compelling an officer of a corporation to produce its books. It was held that the corporation itself could not plead privilege (221 U. S., 382-4), and that it was the duty of an officer, or other custodian of corporate books, to produce them, as was held in *Hale* v. *Henkel*, 201 U. S., 74-5, even in a proceeding against himself personally (221 U. S., 385). It was held that the officer could not separate himself from his corporate duty. "If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures" (Do. 384). "Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody, and should produce the books which he holds in his official capacity in accordance with the requirements of the subpœna" (Do. 386). But

this case does not enter into the question of the effect of an immunity statute, whether by way of pardon or otherwise. It was not a case under the Interstate Commerce or Anti-Trust Acts. It holds that a witness may be compelled to produce corporation books; but it says nothing about immunity. The immunity statute was not involved. In a proper case under the Sherman Act a witness may be compelled to produce his private books or corporation books of which he is custodian, but the case does not deny that he receives his *personal* immunity as the statute directs. On the contrary the reason he was compelled to produce the books was *because he would be personally immune thereafter.*

B. & O. v. *Int. St. Com.*, 221 U. S. 612, sums up the law on this head as follows:

"Nor can the corporation plead a privilege against self-incrimination under the 5th Amendment (*Hale* v. *Henkel*, 201 U. S. 74, 75; *Hammond* v. *Arkansas*, 212 U. S. 348-9; *Wilson* v. *U. S.*, 221 U. S. 361).

"Nor can an officer plead that the immunity guaranteed by that amendment relieves him personally from making records from the books and papers of the corporation, and he cannot claim a personal privilege in hostility to the requirement" (221 U. S. 622-3).

In this case an officer of a railroad company was required to make up monthly reports of accidents. No question of immunity was involved; and *non constat* but the witness would have been personally amnestied from prosecution on account of any matter disclosed by his testimony, in a proper case.

The same principle is recognized,

Am. Lith. Co. *v.* Werckmeister, 221 U. S. 611.

There is not a syllable in any of these cases that would warrant the Court of Appeals in drawing the conclusion on which it based its decision we seek to review. On the contrary, it has been held by this Court, in the only case we can find in which the exact point was raised, that the witness gains his *personal* immunity in such a situation.

Interstate Com. Com. v. *Baird,* 194 U. S. 25; a case of compelling witness to produce certain railway corporation papers. He was subpœnæd as agent and custodian of records, and testified on behalf of the company. Witness claimed on the stand that he would not be *personally* immune under the statute of February 11, 1893, as the papers were records of the corporation, thereby raising the precise point, just stated, otherwise decided by the court below; but the court held he would be *personally safe,* and therefore must produce the evidence called for. The gist of the decision was that the statute "expressly extends immunity from prosecution or forfeiture of estate *because of testimony* given in pursuance of the law"—and this despite the fact that he was compelled to produce the records as agent and on behalf of the corporation (194 U. S. 45); and "The statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate" (194 U. S. 46; Cf. Hale *v.* Henkel, 201 U. S. 73). Beyond this point the case did not discuss the effect of immunity. But the witness' plea being that he was not *personally* safe, the ruling that he was

is a decision by this court directly on the point held by the lower court.

We regret that precedents are so rare on the exact point. But that is nothing against us; probably no one ever dreamed before of denying *personal* immunity to a corporate officer subpœnaed to produce his company's book—the very thing the law wants. What would become of this statute, and all the good work it was designed to accomplish in the exposure and prosecution of offending trusts and monopolies, if corporate officers—of all persons in the world—are denied immunity when they obey the Government's subpœna and produce books and other inside information on part of their companies.

And further, for explanation of the way the clew given by Petitioner's testimony led to the discovery of the "sugar-weighing frauds", we refer to the statement of facts in Part II.

POINT V.

The adversary brief criticised by anticipation.

Although we have not seen the Government brief, of course, yet we may form a general idea of what will probably be its line of argument from the brief submitted by the Solicitor General in answer to the petition for the writ of certorari herein last February, and we wish to say a few words in reply.

The Government admits the immunity statute is one of annesty *in principle*, but denies that it is so in *practical application*.

The Government could not very well dispute that the statute is an amnesty statute in the eye of the law, for this Court has expressly held it to be "an act of general amnesty."

Brown *v.* Walker, 161 U. S. 601.
Burrill *v.* Montana, 194 U. S. 578.

There is nothing in this decision that looks as if the Court intended it to apply only to a witness on the stand, pleading his constitutional privilege and tendered the statutory immunity as a succedaneum; on the contrary it looks as if the Court defined the general nature of the statute with the intention of having the principle thus announced followed out to all its practical consequences, both on the witness stand and after. Yet from the beginning of this case the prosecution and the Courts below have steadfastly refused to admit the theory of the statute, thus established, has any bearing upon the practical application of immunity. And even now our learned adversary, while freely admitting the amnesty nature of the statute as an academic principle, contends, we believe, that in practice, when applied to concrete cases, it operates precisely the same as the constitutional privilege, and subject to the same conditions and limitations.

Thus, the previous Solicitor General's brief contended that petitioner's plea of immunity was bad because the evidence he gave at the anti-trust inquiry did not prove *indispensable* to his conviction—that what is proved might have been proved by other evidence. That is a question belonging exclusively to the constitutional immunity. The objection cannot be raised against a

statute of *amnesty*. For amnesty is the plenary grace of the sovereign; it matters not whether the consideration given by the subject be great or small; the sole condition is that testimony he gave "concerned" the offence discovered in some degree—he need not testify about the offence directly—it is enough if he furnish a "link" of evidence or a "clew" to the discovery, or neither, if one concern the other in any way—and then the amplest possible amnesty protects him from prosecution.

And so our learned advisory urges that the discovery of the crime was too *remotely* connected with the testimony Petitioner gave at the anti-trust inquiry, and quotes with approval from the charge at *nisi prius*, where the Court ruled out the plea in bar on the ground, in substance, that there was no thought of exposing the sugar-weighing frauds at the anti-trust inquiry, that neither the examining attorney nor the witness, Heike, *knew* of these frauds at the time, and therefore that the evidence produced was not material to the indictment (Record pp. 268, 269, 271). To this we reply that the statute does not require that witness should testify *directly* to the crime discovered; and there is no question but the so-called "table of meltings," furnished by Petitioner, showing the actual weight of sugar imported, when compared with the "government weighings" showing the amount on which duty had been paid, led to the discovery of the under-weighing frauds which are the subject of this indictment; Petitioner's evidence discovered the discrepancy, and the discrepancy discovered the frauds. And on this point we ask the Court to

read the statement of facts in Part II, in addition to what we have already said.

Our adversary may argue that Petitioner's *ignorance* of the frauds in question is a reason for rejecting his plea, as he did in his former brief, near the middle of pages 8, 14 and 27. Knowledge may be a consideration in case of the constitutional privilege, for it must be claimed in advance or waived. But how can you *waive* an amnesty or pardon before you get it? A witness must claim the constitutional privilege, if he wishes to secure the benefit of its subsequent immunity—and so of any statute that aims only to protect a witness from compulsory self-incrimination—and that can only be done by pleading the privilege when he is asked an incriminating question. But an annesty statute is different; it bestows its favor on all who are entitled without further requirements. It must be pleaded if the annestied party be prosecuted, but that is a matter of legal procedure, and applies to a pardon, a plea of *autrefois acquit* or any other bar to prosecution, and is by no means a limitation or qualification to the plenitude of the act of amnesty.

The difficulty with this statute seems to be to make it understood that its annesty goes into effect exactly *the same as if the constitutional privilege never existed.* It is not conditioned on it; it has no reference to it. It operates in the same was as the Presidential proclamations of amnesty after the Civil war, or the statute of March 22, 1882, § 6, amnestying Mormons for past polygamies. Amnesty applies to the innocent as well as the guilty; it would be immaterial to inquire of one who has been amnestied whether he was

guilty or not, still less, whether he had any knowledge of the offence, for he is equally immune in either case. President Lincoln's proclamation of December 8, 1863 granted amnesty to all who would take the "iron-clad oath." Read *U. S.* v. *Klein*, 80 U. S. 128, and consider how absurd it would have been to require of one who had taken the oath, other conditions imported from cases on the Fifth Amendment. President Johnson's proclamation of December 25, 1868, granted amnesty to all rebels without condition. Read *Knote* v. *U. S.* 95 U. S. 149, and consider how absurd it would have been to deny the benefit of the proclamation to one accused of treason on the ground of knowledge or any other of the points raised here by the Government. The only other *amnesty statute* we know of is the Mormon statute of Mar. 22, 1882. Now suppose a man prosecuted for polygamy and pleading this statute; would not it be absurd for the Government to object to it because it had not been previously pleaded or tested as a *privilege* in an entirely different kind of proceeding? Yet that is what the Government is doing now with this amnesty statute.

The Government still insists, we believe, that the immunity in question extends no further than the offence or offences under examination when the witness gave his testimony; that is, the pardon gained by the Petitioner extends no further, in any event, than to violations of the Sherman Act. We have already said of this point, that it would substantially nullify the object of the statute, for individuals do not carry on trusts and monopolies, and unless the amnesty extends to all their private offences that may be by any chance discovered it would be of no use. But

the learned Solicitor General has discovered a new point. He quotes the statute, viz:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts."

This provision, he then says, should be construed so as to read as follows:

"No person shall be prosecuted * * * in any proceeding, suit or prosecution under said acts."

If we leave out the central part of the statute, it certainly does read, that what is guarded against by the statute is prosecution in any proceeding under the Anti-Trust Acts. But the provision may be parsed another way; instead of attaching the last clause to the first, so as to make it qualify the prosecution, it should be attached, as it really is, in fact, to the clause immediately before it, so as to make it define the place of testifying, viz:

"No one shall be prosecuted * * * for any * * * thing, concerning which he may *testify* * * * *in any proceeding, suit or prosecution under said acts.*"

In our view, the statute says that testimony in a proceeding under the Sherman Act only immunes witness from prosecution. The adversary view is, the statute says that the testmony immunes witness from prosecution under the Sherman Act only. We submit this question of grammar to the Court.

Our learned adversaries also use the argument against allowing criminals an immunity "bath." There is nothing approbrious or ridiculous about a bath. The word excellently describes the oper-

ation of an amnesty statute. The millions who came under the amnesty proclamation after the war received an immunity bath. A criminal can not gain immunity, for his own ends, by volunteering his undesirable testimony; it is only when he is required by the Government's subpoena, that his testimony avails him; but Congress has decided that that is sufficient protection for the public interest.

The former brief of the Government also claimed that Congress could not have intended the power of the statute to be "so irresponsibly exercised"—that is, left it to district attornies to give immunity to any one they chose to subpoena. But Congress grants the immunity; it directs district attornies to investigate the trusts, and when they obey, Congress grants amnesty to such as they chose to subpoena for that purpose.

The Solicitor General inadvertently made a misstatement of fact, which may possibly be repeated. It was said that Petitioner claims immunity on account of the evidence he gave in the "Kissel loan inquiry." The Kissel inquiry plays but a secondary part in this case. The principal source of discovery here was the testimony given and documents produced in subsequent inquests under the Sherman Act, pleaded in bar, 1 Record, fols. 114-123, and Exhibit C, fols. 137-141. It was at this second inquiry that Petitioner furnished the "meltings" evidence, from which the learned Court of Appeals inferred sufficient connection with the indictment (Do., fols. 4934-5).

Our learned adversary also argued, bottom of page 14 and top of page 20, former brief, that lack of connection was shown by us between Heike's testimony and the sugar-weighing frauds, because

evidence of the latter would not be "relevant" to prove a violation of the Sherman Act. But that is not the point of the statute. An embezzlement or a sugar-weighing fraud discovered from books produced may not be relevant evidence of the commission of a crime under the Sherman Act; but the immunity provision works the other way round; the statute provides that a witness in a Sherman Act investigation shall be exempt from prosecution for anything he may discover, especially for his private crimes *dehors* the Sherman Act.

Our learned adversary makes the point that the issues on the plea in bar, now subject to review, are all questions of law. He says, the issue on a plea in bar may be one of law or one of fact; if of law only, the Court decides it at once; if of fact, it is left to a jury; and in the latter case, if the evidence be all on one side, the Court may direct a verdict, leaving only a question of pure law for review. This is true; and therefore, *if there was any evidence whatever* before the jury to justify a verdict for Petitioner, the direction of the Trial Court to return a verdict for the Government was error, and the judgment of the Circuit Court should be reversed.

PART II.

POINTS ON THE GENERAL ISSUE.

Statement of Facts pertaining to the General Issue.

In Part I we have already given the pleadings, the indictment, the judgment overruling the plea in bar, and the entry of the plea of "not guilty" *nunc pro tunc* as of February 14, 1910 (1 Record, fol. 89).

Heike v. U. S. 217 U. S. 427.

Petitioner, with other defendants, was then tried before Hon. James L. Martin, District Judge, and a jury, from May 17 to June 10, 1910, on the issues joined by said indictment and plea of not guilty (Record, vols. 2-5). The jury found petitioner, "guilty as charged in the indictment on the sixth count only" (2 Record, fol. 4099); a motion in arrest of judgment upon all grounds raised at said trial of said sixth count, was denied (Do. fols. 4110-3); and Petitioner was thereupon sentenced by judgment entered September 19, 1910, to eight months' imprisonment and a fine of $5,000 (Do. fols. 4114, 4118).

A writ of error was immediately sued out by your petitioner (1 Record, pp. 1-13); decision was made by the Circuit Court of Appeals affirming the conviction in all respects (2 Record, pp. 1641-1661), and judgment entered thereon October 16, 1911 (Do., p. 1662).

Proceedings at the trial on the merits are recorded, pp. 340-1329.

Exhibits, pp. 1216-1232, 1533-1640.
Requests to charge, pp. 1345-1360.
Charge of Court to Jury, pp. 1329-1344.
Exceptions to charge allowed, fols. 4032-3.
Motion for arrest of judgment, p. 1371.
Assignment of errors, pp. 1390-1449.

As stated in the opinion of the Court of Appeals, there were six counts in the indictment. The first four charged that defendants "did unlawfully and knowingly make and effect and aid in affecting" the entry of certain specified cargoes of raw sugar at less than their true weight. The fifth count charged that the defendants had *conspired* "to defraud the United States" of lawful duties upon importations of raw sugar by effecting the liquidation of duties thereon at less than their true weight. The sixth count charged that defendants had conspired on March 1st, 1907, "to commit offenses against the United States in and by knowingly making and effecting and aiding in effecting, at less than their true weights, and by means of false and fraudulent written statements as to said weights, entries of certain goods, wares and merchandise," to wit certain dutiable raw sugars which theretofore had been imported and thereafter were continuously to be imported into the Port and Collection District of New York. Of the overt acts set forth in the sixth count four only named Heike. They charged his endorsement of four cheques from the United States to the American Sugar Refining Company, purporting to represent respectively an excess of deposits for duties on four different cargoes, but actually representing part of the duties then and there lawfully due to the United States upon these four cargoes.

Heike was Secretary of the American Sugar Refining Company, which is a New Jersey corporation; he was also secretary and treasurer of the American Sugar Refining Company of New York. The jury found Heike guilty on the 6th count only (2 Record, fols. 4223-5).

The sixth count, as summarized by the Court (fols. 4939-4942), charges that defendants and others "conspired to commit offenses against the United States in and by knowingly making and effecting and aiding in effecting, at less than their true weights, and by means of false and fraudulent written statements as to said weights, entries of certain goods, wares and merchandise, to wit, certain raw sugars, which then and there were subject to duty as aforesaid, and which theretofore, to wit, prior to March 1st, 1907, had been imported and which thereafter were continuously to be imported into the United States, into the Port and Collection District of New York, through the Collector of said port from foreign countries as aforesaid by the said American Sugar Refining Company of New York."

The sixth count is under Section 5440 of the U. S. Revised Statutes which makes it a "crime if two or more persons conspire—to commit an offense against the United States." The offense to be committed must be a statutory one. The government contends that the offense which defendants conspired to commit was within the enumeration of both of Section 5445 of the U. S. Revised Statutes and of Section 9 of the Customs Administrative Act of 1890, viz:

5445. "Every person who, by any means whatever, knowingly effects, or aids in effecting any entry of any goods, wares, or merchandise at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined not more than five thousand dollars, or be imprisoned not more than two years, or both."

Section 9. "That if any owner, importer, consignee, agent or other person shall make or at-

tempt to make any entry of imported merchandise by means of any false or fraudulent invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof embraced or referred to in said invoice, affidavit, letter, paper or statement, or affected by such act or omission, such merchandise or the value thereof, etc."

In order to convict Petitioner it was necessary for the Government to prove three essential things: 1st, that the United States was actually defrauded, i. e., was paid less than the legal duty; 2d, that this was brought about by the fraudulent contrivance of the conspirators; 3d, that Heike participated in or knew about and was responsible for the fraud. On the first head, the true weight of the sugar imported was ascertained for the purpose of levying duty by the "custom house" weight. The underweighing frauds were perpetrated at the government weighing; and the method is thus summarized by the Court:

"Upon the arrival of sugars money was deposited with the collector sufficient to cover duties at the invoice weights. The sugars were then weighed by government weighers, and duties finally liquidated upon their return of weights. Certain of the conspirators were present at these weighings, tampered with the scales and thereby made the apparent reading of weights registered on the dial or scale less than the true weight, in consequence of which the government weighers' written statement as to the weights was a fraudulently made false statement. Being accepted by

the Collector as true, return of excess duties over amounts deposited was made to the company which imported the sugar" (Record, fols. 4940-1).

The Sugar Company kept record of the actual weight of sugar received, called the "meltings" or "refinery" account. It was independent of the government weighing, with its allowances for drying, sea loss, and other causes of shrinkage. From it the Company figured the price of sugar to be sold. By comparing these refinery weights with the government weights the loss to the Government was calculated. These melting weights, a table of which was furnished by Mr. Heike, we claim in Part I, led to the discovery of the frauds.

The responsibility of the Petitioner is the main source of error. It is evident he did not participate in the actual fraud of tampering with the scales. That was done on the docks in Brooklyn; Mr. Heike was in his office in Wall Street. The evidence of notice is purely constructive. The Court ruled that it was a self-evident proposition that some one higher up than the employees who weighed the sugar was to blame (fol. 4979). The evidence of participation also is purely circumstantial (fol. 4980), and Petitioner's responsibility was deduced from his official relation to the Company. But he was not manager; he had nothing to do with the practical management; he was not in the customs department; he was not a bookkeeper; he had no special knowledge of the four cheques which serve as overt acts in the conspiracy count. We submit there was nothing in the evidence to put him on inquiry; and he is charged with knowledge on surmise—because it was a possibility of the situation—and not on legal proof.

But to show this the Court should consider the whole situation and Petitioner's peculiar relations with the Company. And for that purpose we ask the Court to read this statement, carefully prepared by Mr. Heike himself, and adopted by us, with references to the record.

The crime for which Petitioner was convicted is one which it was not possible for him to commit. He had nothing to do with the supervision of the refineries and their operations. To overcome this difficulty, the Government has endeavored to disregard, or to belittle, the importance of his position in the departments for which he was responsible, and on the other hand to magnify his position in reference to other departments in which he had no authority whatever. This explains the phrases repeatedly used in reference to him, such as "the Chief fiscal officer of the company" and again, "the active Overseer of the management of the various refineries."

Duties of the Secretary.

1st: Petitioner called the meetings of the Directors, and of the Executive Committee, of the American Sugar Refining Company, and of the other companies. He was present at all the meetings and kept the minutes. (fols. 3130, 3831).

2nd: He attended to all the transfers of common and preferred stock of the company, and signed the stock certificates,—formerly as Acting Treasurer; since 1899 as Secretary (3130). This was his most important work, for which he alone was responsible. (3831). The transfers were very many, for it appears that during the nineteen years commencing January 10, 1891, there were transferred in average 987,065 shares per year,

so that more than the whole capital stock of the company was transferred annually. (3131). Connected with it was a large correspondence with the stockholders, whose number now exceeds eighteen thousand. The Transfer Department paid the quarterly dividends, which also necessitated a great deal of correspondence.

3rd: He attended to all the fire insurance of the company. (3132).

4th: As Secretary, he was the general letter writer of the company, on many subjects, including the whole correspondence in reference to the company's investments in beet sugar factories. (3133, 3832, 3833).

He was also the Secretary of the Great Western Sugar Company and transferred its stock. (3286, 3831).

5th: In accordance with the usual By-Laws in such cases, he as Secretary was the nominal custodian of all the books and accounts of the company; but, as a practical matter, did not give them personal attention, and they were kept and run by the Auditor, Mr. Foster, and a corps of assistants. (3133).

He had, however, nothing directly to do with:

Raw Sugar Department: The purchase of sugar; its unloading and weighing at the refineries. (3134, 3596, 3833).

Custom House Department: The making of entries, paying of duties, and liquidations of entries. (3134, 3597, 3833).

Refinery Department: The management of the refineries, and the technical work which is done there. (2639, 2642, 2693, 2444, 2833).

The Refinery Department is the most important department of the company. Its members receive the largest salaries the company pays. Mr. Niese and Dr. Hooker each receive $50,000 annually. (3829). Mr. J. O. Donner, who died in 1900, and whose name was mentioned at the trial, was a member of this department. He received an annual salary of $100,000. (3901).

Petitioner's salary was increased to $15,000 in 1899 when he was electel Secretary, and to $20,000 in 1901. All the salaries and their increases were determinel by the Board of Directors, and noted on the minutes. (3285-6).

To continue the duties as Secretary:

At the end of every month he prepared statements for the President and the Directors, which showed the financial results of the operations of the several refineries during the month; and only in connection with these statements did he come in contact with the Raw Sugar Department and the Refinery Department. (3135, 3832).

These statements gave, on the credit side, the total of refined sugar sold, and the unsold stock on hand at the end of the month (less the stock on hand at the beginning of the month); and, on the debit side, the quantity and cost of the raw sugar melted, and the expenses of manufacturing and selling. "The difference between the two was the profit or the loss of the month, as the case might be." The expenses and the results were calculated on the basis of 100 pounds of Raw Sugar melted. (3137, 3138, 4864, 4872).

The Company had five Refineries in active operation—one in Brooklyn (Havemeyers & Elder), one in Jersey City, one in Boston, one in Philadelphia and one in New Orleans. (3146).

It had always been noticed that Havemeyers & Elder showed very poor results in comparison with the other houses.

In order to facilitate the comparison of these monthly statements of the several refineries, and thereby to increase their usefulness, he arranged with Mr. Niese of the Refinery Department (in 1900), that all the items which enter into the statements should be prepared on the same plan for each refinery (3159-3164):

(a) The expenses, in their subdivisions.

(b) The raw sugar melted, its weight and price.

All raw sugar purchased by the company was charged to what was called "Import Account". (3161). The quantity of raw sugar melted at the refinery was credited to this Import Account, and debited to an account called "Melting Account." (3162, 3164).

Payment for imported sugar is made on the invoice weight, which is the weight of the sugar at the shipping point. (3843). When sugar arrives at New York and is reweighed, it generally shows a loss, which varies in accordance with the quality and grade of the sugar, and the distance from which it came. Of course, this loss in weight on raw sugar is a loss to the company, and it is one of the expenses of the manufacture of refined sugar. (3162-3).

The plan adopted in 1900 provided that the loss in weight was to be divided between the import account and the melting account. The customary or expected loss was to be borne by the import account; any excess was to be debited to the melting account, and thereby to the cost of making refined sugar. (3162, 3163, 3164).

The melting books of the Havemeyers & Elder Refinery and the Jersey City Refinery were kept at the New York Office by raw sugar clerk Montgomery, who would enter in them, in *black* ink, the pounds of sugar actually received and melted at the refinery as reported to him, and their cost at a fixed price per pound. He would enter in *red* ink, the pounds representing excessive losses in weight, as calculated for him by import clerk Schmelter, and also their cost at the same price per pound. The total of these two amounts—the one in black ink, and the other in red ink—would be the value of the raw sugar to be debited to the melting account of the refinery, and which would thereby enter into the calculation of the cost of manufacture. (3441, 3444, 3170-1, 3175).

From the monthly financial statements, which he regularly furnished to the President and the Directors, he had prepared condensed statements, giving the annual manufacturing profits of each of the five refineries for the years 1901 to 1908. These statements were submitted at the trial, and they are printed in the record. The last column in them shows the annual gain by each refinery calculated for 100 pounds of raw sugar melted. (3864-3872).

The recapitulation of these Tables shows that undue profit claimed for Havemeyers & Elder was ill founded.

Manufacturing profits for the 8 years, 1901 to 1908 inclusive, per 100 lbs. of raw sugar melted, of the A. S. R. Co.'s five refineries, calculated on same basis as to weights and tests. (4900-4911, 3373-3390).

Havemeyers & Elder Refinery... 8.842 cents.
Jersey City Refinery.....22.758 do.

Boston Refinery .....24.443 do.
New Orleans Refinery .....17.067 do.
Spreckels Refinery, Philadelphia.17.988 do.

In the statements submitted at the trial, and which correspond with the entries in the company's books, the gain of Havemeyers & Elder appears as 13.842 cents (4910), instead of 8.842 cents; but this gain should be decreased 5 per cent per 100 pounds for the systematic understatement by that refinery of the polariscopic test of the raw sugar melted of ½ degree, (which equals 1/20 cent per pound in value) (2725-7, 2890-1, 3296).

This difference in test was well known to the Refinery Department and the Raw Sugar Department, and considered in the comparison of the refineries and the purchase of raw sugar, but no authority had ever been given to make the correction on the books. The amount was stated, however, in the tables submitted and printed in the record, as: "Value of Loss in Test (Polarization) ½ degree, equal to 1/20 cent, not debited to Melting Account, but borne by Import Account, on 8,605,896,703 pounds of raw sugar=$4,301,948.35." (4902).

It was one of the surprises of the trial when Mr. Gerbracht testified that it was by direction of Pres. Havemeyer that the report of the lower test on raw sugar had been made to the Central Office, and which had increased the apparent manufacturing profit of the Havemeyers & Elder Refinery by the amount stated (2726-7). Mr. Gerbracht testified at the same time, that he had also been instructed to report a higher than the true test for the refined sugar produced, of which Petitioner had never heard before. (These incorrect

polariscopic tests must also have appeared as gains of crystallizable sugar in the technical statements. The lower test on raw sugar melted of ½ degree would give +0.50, and a higher test on refined sugar produced of ¼ and ½ degree would give +0.25 and +0.50, or +0.75 to +1.00 for the whole.)

It is the remarkable fact shown by these financial statements, that the gain at Havemeyers & Elder was regularly very much smaller than at any of the other four refineries. No one familiar with these figures would find any basis for a hypothesis that that refinery was securing a large amount of sugar duty free, or from an unfair or secret source—quite the contrary (3390, 4900-4910).

For instance the gain of Havemeyers & Elder was 8.842 cents as against 22.758 cents by Jersey City, a difference of 14 cents, which on the Havemeyers & Elder melt of a little more than a billion pounds of sugar amounted (in round figures) to $1,400,000 annually. In other words the Havemeyers & Elder Refinery by its poor working, if compared with the Jersey City Refinery, lost $1,400,000 per year (3375-3390).

Most extraordinary is the Government's attitude in regard to these facts, as every outsider had believed that Havemeyers & Elder were the best refiners in the country. The Government ignord them and stated instead:

"If then these Custom House weights were fraudulent, if they were less than the true weights and the refinery was using them as the basis of its meltings, the fraud must be disclosed by the records showing the workings of the refinery; for if Gerbracht, the refiner, was getting more sugar than he was charged with, it should follow mathe-

matically that he was enabled to turn out a bigger profit, and this is exactly what his records show."

Prior to the year 1908, Petitioner knew but little of the practical work of the sugar refining business; but through the investigation in connection with the underweighing cases, and the trials following it, to which he had been subpoenaed as a witness, and also through the testimony of witnesses at his own trial, he obtained a great deal of information. He was much surprised, when he first learned the custom house weighers did not have Government scales on the docks of the refinery for the weighing of sugar, but that they used the scales owned by the sugar company (3293).

The testimony given at the several trials revealed an almost incredible mismanagement at the Havemeyer & Elder Refinery, and which apparently had made these frauds possible. It was never made clear, however, who really had been benefited by them. Certainly not the American Sugar Refining Company, which had always found the results of that refinery so disappointing.

It was learned that Oliver Spitzer, the dock superintendent, had been able to deposit large sums annually in his private bank account,—sums very large for a man whose wages never exceeded 55 dollars per week; but which would not account for the millions claimed by the Government (3610). The city weighers may have taken advantage of the demoralization and have weighed the sugar bought by the company too "illiberally."

Chief Fiscal Officer.

The by-laws authorized three persons to sign the checks of the company, the President, the

Vice President and the Treasurer; but in reality the checks were all signed by the Treasurer, Mr. Donner, and by an Assistant Treasurer, whom the Directors had appointed for the purpose. The Directors by special resolution, also authorized Mr. Henry C. Mott, the head of the Raw Sugar Department and buyer of the raw sugar, and Petitioner, the Secretary of the Company, to sign checks (3291); but only two latter signed checks only during the absence of Mr. Donner and his assistant, though Petitioner signed many more checks than Mr. Mott (3594, 3606).

In November 1901 the American Sugar Refining Company of New York was incorporated for the sole purpose of holding the title of the company's property in the State of New York (3127-8). Its elected officers (two in all) were Mr. Arthur Donner (3594), President, and Petitioner, as Secretary and Treasurer. These changes, however, were merely nominal and the actual management continued exactly as before. Mr. H. O. Havemeyer, the President of the American Sugar Refining Company (of New Jersey), looked upon himself as also the President of the New York Company, on Mr. Thomas as its Vice President and on Mr. Donner as its Treasurer; this is shown by his letters, which were submitted at the trial. On Petitioner, however, Mr. Havemeyer looked merely as the Secretary, whose chief duty was the transfer of the certificates of stock, who attended to the larger part of the correspondence, the financial statements, etc., but who had nothing to do with the management of the refineries (4885-6, 4892).

The checks of the New York business were signed as before by Mr. Donner and his assistant;

the only change was that the word "President," was added to Mr. Donner's signature by a rubber stamp, instead of the word "Treasurer." During his and his assistant's absence, the checks were signed by Mr. Mott and Petitioner (3290-1).

Endorsement of checks was made with a rubber stamp, except those received from the Government, which are required to have the actual signature of an officer of the company, and during the absence of Mr. Donner they were endorsed by Petitioner. Mr. Donner testified at the trial that it was on account of his absence in Europe during August and September, 1907, that the refund checks mentioned in the indictment had been endorsed by the latter (3291, 3606, 3291).

Overseer of Refineries.

The management of the refineries is entirely in charge of the Refinery Department which, as already has been stated, is considered the most important department of the company. It is its duty to examine the operations of the refineries in all details. It was testified at the trial that Mr. Niese, the head of the department, visited the Havemeyers & Elder Refinery weekly to examine its work (2644, 2833; 4889, 4890).

Petitioner had nothing whatever to do with the management of any of the refineries, and was without authority there (4889, 4890). He could have given no orders to the superintendent or to any one of the employees. If for any reason he had desired a change in the refinery's methods—the weighing of sugar, for instance,—it would have been necessary for him to try to persuade the Refinery Department to give the needed instructions (2677, 3596-7, 3612-3, 3617).

Moreover, it is not very likely that the Directors would expect their Secretary, an extremely busy man in his particular work, to use his spare moments to oversee the company's manufacturing operations, for which the most important department had been created.

System of Bookkeeping (not to conceal).

The insinuation that the method of bookkeeping adopted in 1900 was designed for the recording of frauds, with the desire to conceal them, is denied. The very opposite is true. The difference in weights were entered in red ink, to call attention to the figures which were arranged to show the operations of the refineries, and to suggest corrections (4730, 4733).

Moreover, the red ink entries extend to non-dutiable as well as to dutiable sugars. If these red ink additions were devised for the purpose of bookkeeping the frauds on the customs revenues, why were they used in the case of non-dutiable sugar? (3214).

The tables prepared by import clerk Schmelter were statistics for the use of the Raw Sugar Department in buying sugar (3177). They contained the invoice weights, refinery weights and custom house weights, to enable the calculation of the loss in weight (3460).

It must be remembered that the company purchases during the year three billion pounds of raw sugar, and that the loss in weight is an important item which enters into the cost (4903-8). The buyer compares the quotations at which sugar can be purchased at any part of the globe (3178, 3543, 3544). He carefully calculates what the cost of the sugar will be

when it is received at the refineries, and which includes the original price, freight, insurance, etc., and the expected loss in weight which is based upon former years' experience (3851-2). To illustrate: Java sugar, showing a loss of three per cent., may still be cheaper to buy than Cuba sugar losing only one-half per cent., or Porto Rico sugar, losing nothing at all. It depends entirely upon the price to be paid for it (3855-6).

All the information in regard to differences and losses in weight was at the disposition of any of the company's departments that could make use of it. There was nothing secret about it and no desire to conceal the facts. On the contrary, the new system of bookkeeping, which was in its essence a contrasting of the settlement and refinery weights, necessarily brought all discrepancies and differences in the clearest light. It was the old system which tended to conceal, because the old system, by charging each refinery merely with the refinery weights, necessarily buried in the Import account all differences between refinery weights and settlement weights and prevented any contrasting of the two in one statement (3851, 3909, 3172, 3535-6).

Differences in Weight (Charged to Melting Acct.).

The Pounds of Raw Sugar represented by the excessive losses were not charged on the books of the refineries, as they had not been received by the refineries, but to the Melting Account of the refineries in the city office, because the company had paid for them and they were added to show the cost of the refined sugar produced (3325-6).

The differences were due to liberal Custom House weights only in a small part. The other reasons were:

(a) The invoice weights were taken in foreign countries and by the sellers of the sugar, who might weigh too closely; sometimes the weights were based entirely on averages and not actual weighing.

(b) Losses in transit, the natural shrinkage (3275-6, 3317).

(c) Losses by marine damage. Sugars were insured, but marine policies do not allow claims for damage on merchandise for very small amounts. Sugar policies read "free of particular average of 7%," so that a claim for loss must be 7% of the value of the cargo before it is collectible. This provision of the policies has been somewhat modified of late, by allowing in some cases a separate adjustment of each of the "marks" into which a cargo may be divided. A claim may be made under such policies, if the loss on one mark exceeds 7%, though the loss on the whole cargo is less.

These losse are one of the risks or expenses of the sugar business, and they are considered as one of the items in the cost of making refined sugar.

Liberal Custom House weights.

So many confusing statements have been made in regard to "liberal Custom House weights" that we give an outline of the manner in which import duty on raw sugar is collected by the Custom House; also, in regard to the selling by the importers on the City Weigher's weight. It is

from a letter which Petitioner wrote 3 years ago in answer to an inquiry from a stockholder:

"When a vessel arrives from a foreign country with a cargo of sugar consigned to us, we make at once an entry at the Custom House and we surrender the original invoice sent to us by the shipper, to the correctness of which the American Consul has certified. We pay duty on the number of pounds stated in the invoice, and the sugar is then unloaded under the supervision of C. H. Officers and is weighed (and tared) by C. H. weighers. The sugar is also sampled by C. H. samplers, for polarization by C. H. chemists. The results of the weighing and sampling are afterwards sent by the government employes to the proper department in the Custom House, where the original entry is then liquidated. If it is found that the Custom House weight is larger than the invoice weight, for instance, if the invoice weight had been 5,000,000 lbs. and the Custom House weight is 5,050,000 lbs., a notice is sent to us to pay duty on the additional 50,000; but if the Custom House weight is smaller than the invoice weight, say 4,900,000 lbs., then the duty on the 100,000 lbs. is returned to us in a Treasury check. Similar adjustments are made in regard to the polariscopic tests. The Custom House weights are assumed to be correct; moreover, the department has for comparison the original invoices and the landed weights of all cargoes of sugar imported here by all the refiners and all the merchants, and if at any time an unusual discrepancy is noted, the liquidating clerk has the opportunity, and it is his duty, to investigate it at once. For the importer, however, the Custom House weights are final and there is no appeal.

"If a cargo of sugar is weighed twice and by different weighers, the results are never the same; there is particularly a considerable variance in the tares. It is understood that the government weighers weigh correctly, but rather liberally, and on that account their weights are not used by merchants in making sales. A good deal of sugar

which arrives at New York is consigned to merchants, who pay their own duty, and who afterwards sell the sugar to refiners. They always sell on landed weights. The sugar in such cases is landed either at the dock of a refinery, or at a public wharf or warehouse, and it is weighed there by C. H. weighers; such weight is landed weight and on it the duty is paid. Although the importer receives a statement of that weight from the Custom House without charge, he does not use it for the invoice to the refiner, but he hires another weigher, called the City Weigher, who, at considerable expense, rehandles and reweighs the sugar, and the importer does so, because he knows that the city weigher weighs the sugar more closely, and that the value of the additional number of pounds is greater than the additional expense. On the city weigher's weights the invoice is rendered to the refiner and paid. I will add that there is no case on record that an importer ever went to the Custom House Collector and said, 'I have had my cargo of sugar reweighed by a city weigher who has found it heavier than your weighers and I will pay the additional duty on the additional number of pounds.'"

At the trial a large number of original Custom House entries were offered of sugars which the company had purchased on landed weight, but on which the importers themselves had paid the duty, and some of which showed large differences between the Custom House weight and the weight charged to the company (4915, 4917).

Loss of Weight in Voyage.

There is a natural shrinkage in every cargo of raw sugar shipped from foreign parts; so that no one could infer from the discrepancy between invoice weight and landed weight that any artificial

loss had been created by false weighing. The damage to raw sugar on a voyage is of two kinds: "Sweating" caused by deterioration of the quality due to the long voyage in hot climates (the shipments from Honolulu cross the Equator twice); and secondly, "Marine-Damage," caused by salt water. After discharging a cargo and placing the damaged bags on the dock, it is practically impossible to ascertain to which of the two causes the damage is due (346, 3216), and it must be remembered that the company purchases during the year three billion pounds of raw sugar, and that the loss in weight is an important item which enters into the cost. The buyer compares the quotations at which sugar can be purchased at any part of the globe. He carefully calculates what the cost of the sugar will be when it is received at the refineries, and which includes the original price, freight, insurance, etc., and the expected loss in weight which is based upon former years' experience. To illustrate: Java sugar, showing a loss of three per cent., may still be cheaper to buy than Cuba sugar losing only one-half per cent., or Porto Rico sugar, losing nothing at all. It depends entirely upon the price to be paid for it. The company's raw sugars are bought by the Head of the Raw Sugar Department, after consulting with, or under instructions from, the President. Mr. Schmelter testified at a previous trial that Mr. Havemeyer had not seen these tables, although he had ord[illegible]em to be made. If so, he must have re[illegible]ed the required information from another source, for he could not have directed purchases without it. The Secretary was not interested in it.

It has been the company's experience that the largest losses in weight, on high grade sugars, occurred on those received from Java. Mr. Niese suggested that the losses were due, in addition to the shrinkage on the long voyage of 12,000 miles, to the difficulty in ascertaining the correct tare of the peculiar packages (baskets) in which the sugars are shipped (3159, 4874).

The Java Sugars are generally received at New York, Boston and Philadelphia, and they form the larger part of the meltings at Havemeyer & Elder during certain months of the year. It appeared, however, that during the summer of 1907, the company had purchased for New Orleans a large quantity of Java sugar, and that 54 per cent. of the meltings of the New Orleans house in August, were of that grade (3278-3280).

The report showed that the loss in weight had only been ½ per cent., and Petitioner wrote to Mr. J. T. Witherspoon, the manager of the refinery, for the details of the weights which might help to explain the large differences found in Brooklyn. The letter is as follows (4874):

New York, September 19, 1907.

Dear Sir:

I notice that among your meltings of August was nearly 54 per cent. Java sugar. Refinery weights compared with the invoice weights show a loss of a little less than ½ per cent. I shall be obliged to you if you will let me know how the Custom House weights compare with the invoice and refinery weights. It is our experience in New York that Custom House weights of Java sugar show frequently great differences, which is due, I believe, chiefly to the difficulty in ascertaining correct average tare for the baskets.

Yours very truly,

C. R. Heike,

Secretary.

Is it conceivable that the letter would have been written if he, or anyone in the office, had known that the differences in Brooklyn were due to frauds?

Import Duty.

Import duty is not assessed on the weight of the sugar in foreign countries, nor on the pounds lost in transit, but on the pounds actually landed in the United States. The importer, however, always pays first on the foreign weight, in accordance with the original invoice on which he has paid for the sugar and which is surrendered to the Custom House. The sugar is afterwards weighed by the Government and the excess paid is returned (3843, 3846).

The Custom House weights, though known to be liberal, are assumed to be correct; moreover, the department has for comparison the original invoices and the landed weights of all cargoes of sugar imported here by all the refiners and all the merchants, and if at any time an unusual discrepancy is noted, the liquidating clerk has the opportunity, and it is his duty to investigate it at once. It was testified by a Custom House official at the trial that it was the system to note on the same paper of the entry, side by side, the original invoice weight and the Custom House weight, the latter in red ink (1070), in order to call the attention of the liquidating clerk to the difference (1064, 1069, 1152, 1177, 1187, 1070).

Refunds of Duty.

The Government says: "Yet, month after month, he (Heike) continued to accept refunds of

duty (technically known as excess of deposits), tentatively paid upon the basis of the correct invoice weight."

The true fact, however, is that he never accepted any refunds, as the liquidation and refunding of duties was exclusively controlled by the Custom House Department of the company, with which he had no connection (3133, 3832-3, 3597). On a few occasions he endorsed checks from the Custom House to the order of the company, representing refunds, but that was done solely because of the absence of Mr. Donner, the Treasurer of the company. When Mr. Donner was present he never signed or endorsed checks (3606, 3291).

It was not the Secretary's duty constantly to reflect and speculate whether the other departments of the company attended to their work; for instance, whether, if the company's Custom House clerk had accepted a check from the Government, he had first assured himself, that the liquidating clerks of the Collectors' office and of the Naval office had not in any way been negligent when they ordered the refund of duty.

The Turner Letter.

The District Attorney examined all of petitioner's books and papers. He was, however, able to produce only two or three letters upon which an insinuation could be founded. Perhaps the most important letter is that to Mr. Frank G. Turner, of the Boston office, dated December 24th, 1904 (3734-8). This letter was written at the suggestion of Mr. Niese of the Refinery Department, and with the approval of Mr. Thomas, at that time Vice-President of the Company, and the manager of the Boston Refinery (3195-3211). It had been

decided that the system adopted at Brooklyn and Jersey City to charge excessive losses in weight to the melting account—which means to the cost of manufacturing sugar—should be extended to the Boston Refinery. The letter gave the details of the entries to be made on the books in Boston, and are fully discussed (3734).

The Government claims that the letter proves knowledge of fraud on the part of the writer; but the letter was written with the knowledge and approval of Mr. Niese, Mr. Thomas and Mr. Keppler, the Superintendent of the Boston Refinery, and was addressed to Mr. Turner. These men were in charge of the Boston plant and were responsible for it; but no one has thought to accuse them of any intention of fraud. Why should Petitioner, who had no authority in the matter, no motive, and was nothing more than the letter writer, be charged with criminal intent? (3195-3211).

This letter to the Boston Office, instead of proving knowledge on Petitioner's part of frauds and the existence of fraudulent devices at the Havemeyers & Elder Refinery, proves just the reverse. As no one has ever asserted that there were any false scales or other fraudulent contrivances in Boston, it is evident that the Boston differences in weight to which the proposed method of bookkeeping was intended to draw special attention, could not have been the result of the operation of false scales or fraudulent contrivances; but as the new method for Boston was the same which had previously been adopted in the New York books for the Havemeyers & Elder Refinery, it is also clear that he, who wrote the letter, and the others who had suggested and approved it, could have had no knowl-

edge that the differences were due to frauds. The system of accounting, invented as the Government claims, for the recording of false weighing, could have no place in the Boston refinery where no false weighing was done.

The So-Called Non-Interference Period.

Mr. Horace Havemeyer, the son of the late H. O. Havemeyer, and whom he had succeeded as Director of the Company, handed Petitioner in March (1910) several of his father's letterbooks. He had never seen these books, and found that they contained a great many letters to Mr. Gerbracht, giving orders in regard to the operations of the Havemeyers & Elder Refinery. There was also a letter to Gerbracht, dated November 15, 1906, in which Mr. Havemeyer wrote that Petitioner had called his attention to the liberal Custom House weights received by that refinery (3186-3194, 3426). The letters confirm in a way the statement that Petitioner had called Mr. Havemeyer's attention to differences in weights. Petitioner had frequently spoken to Mr. Havemeyer about differences in weights, not particularly Custom House weights (to which he gave no special attention), but rather to the differences between the invoice or settlement weights, on which the company had paid for the sugar, and the refinery weights, which the refinery reported as having received, and he did so generally when he handed to him the financial statements for the month. It was his custom on these occasions to call attention to anything unusual. The loss in weights would be important information for the president, in directing the purchases of raw sugar (3186-3192).

It is claimed that that letter from Havemeyer to Gerbracht had something to do with the Government prosecution against the Sugar Company for rebates; and the cessation of the system of red ink additions in the melting account of the refinery for several months after the date of the letter, was shown for that purpose (3350-8). But the testimony of the auditor and sugar clerk fail to confirm it. The red ink additions on Java cargoes continued during the remainder of the month of November and in December 1906; they were omitted in January and February 1907, because during that period there was only one Java cargo melted, and with a difference of only 1.09%, which, after the deduction of the 1.00% allowed, was too small to justify red ink computation (3433, 3441, 3859, 3860). Similar facts were shown in regard to centrifugal cargoes of which red ink additions continued in November and December. There were no entries in January and February, but (and to substantial amounts) in March and April. The melting books also showed the absence of red ink entries in many months of other years, but in every case because no sugar had arrived which showed a loss larger than the allowed percentage (3859-3860).

As to the claim that he was afraid of the records shown by the red figures, why was that system of bookkeeping introduced by Petitioner? There was no necessity for him to do it; and had there been a knowledge or suspicion on his part of frauds at the refinery, and a willingness to acquiesce, he certainly would have continued the old method which tended to conceal the facts. But the new system, openly introduced, brought into sharp contrast the differences between settlement weights and refinery weights, and multiplied the

ways in which the contrast was made; he had special entries made calling attention to it; he wrote letters explaining the system, and carefully kept and submitted to the District Attorney his records concerning the same (fols. 946-954, 3169, 3172).

The Stranahan Conference.

The most remarkable claim by the Government is that Petitioner prevented an investigation of the method of weighing of sugar at the port of New York, which in 1903 the authorities at Washington had ordered Collector Stranahan to undertake. It was asserted that the loss in weight of sugar was larger in New York than at any other port. Mr. Stranahan sent about thirty letters of invitation to the Sugar Refiners and to prominent Sugar Merchants and Weighers, asking them to a conference to be held at the Custom House. As representative of the American Sugar Refining Company, President Havemeyer had designated Mr. Gerbracht, and Petitioner's sole connection with the incident was a purely formal letter of introduction which, as the general letter writer of the company, he wrote at the direction of Mr. Havemeyer. The conference was held, but nothing furthermore was done. At the trial the Government Attorney, in his closing address to the Jury, held up this letter and said, "So Mr. Heike sent this letter to the collector and stopped the investigation!" But why should he have been interested in stopping the investigation? Had Mr. Stranahan done his duty, the reform of the Custom House service in New York, which has now been undertaken by Collector Loeb, might have been started at that time, and this in turn might have

brought about the reform at the Havemeyers & Elder Refinery, which was so very much needed, and to call attention to which the new system of bookkeeping had been introduced. It has now been accomplished by the Company's Refinery Department, by the same Mr. Niese and the same Dr. Hooker. They have reorganized the refinery and corrected the former mismanagement. Dr. Hooker particularly has been very active in the matter; he has visited the refinery almost daily and has transferred to Brooklyn several of the employees of the Refinery of Philadelphia. The result is, that the Havemeyers & Elder Refinery operates now as well as the Jersey City House and that it shows equally good results.

Motive.

Crimes are not committed without some motive. It is absolutely impossible to suggest a motive for Petitioner to participate in these frauds, even if he had had the power to do so. He could not have received the slightest benefit, either directly or indirectly, in money, position, or otherwise. His salary (which was not large by comparison with the salaries paid to other officers) was fixed by the Board of Directors and entered in the minutes; it was in no way dependent on the operations of the refineries, or any one of them. But if an increased salary had been desired, it would be more reasonable to expect it from improved working of the refinery and not through mismanagement or fraud.

The joint trial had no doubt confused the evidence, and the jury may have believed that he had some knowledge of the frauds.

POINT VI.

The learned court below erred in denying the motion of the defendant Heike for a separate trial. He was unlawfully prejudiced by being tried together with the other defendants.

(Assignment of Error No. 21; 2 Record, fol. 4168).

At the opening of the trial, the defendant Heike moved for a separate trial upon the facts and reasons set forth in the affidavit of John B. Stanchfield. (fols. 1021-1044). The motion was denied. (fol. 1047). The course and result of the trial, it is submitted, have clearly shown the propriety of the motion and the injustice which flowed from its denial.

(1). The case against Mr. Heike was wholly different from the case against the other defendants. It was established that Mr. Heike was at no time upon the docks in Williamsburg and never saw the scales (3398); and concededly no part of his duties required him to inspect the scales or have charge of the weighing. The Government's principal witnesses, Mr. Spitzer, Mr. Walker, Mr. Schwertfeger, Mr. Parr, Mr. Smyth and Mr. Hyatt, all testified to their being unacquainted with Mr. Heike (1720, 1737, 1188, 1200, 1331); and no living witness was able to speak of any conversation with Mr. Heike concerning fraudulent weights or what was taking place on the docks.

Mr. Heike never made any entries of raw sugar; never was connected with the raw sugar,

custom house or refining departments of the Company; never had any authority over the course of business or the employees at the Havemeyers & Elder refinery; never had any responsibility for the success of that refinery, and never had any but the most casual connection with the payment or liquidation of duties. The overt acts mentioned against him in the sixth count were merely the indorsement of four checks sent to the Company in payment of refunds,—indorsements affixed only because of the temporary absence of the treasurer.

Between the position and duties of the defendant Heike and those of the other defendants, all of whom were connected with the Williamsburg refinery, there was the most marked divergence, and a corresponding divergence in the locality and nature of the acts charged respectively to have been committed.

Necessarily, therefore, a vast mass of evidence admissible against the other defendants was clearly incompetent against the defendant Heike.

By way of illustration, the very prejudicial testimony of Spitzer (1785-88) that the superintendent continued to pay wages to him and to the checkers after their discharge, was received upon the theory that it was admissible against the defendant Gerbracht only. So, also, the statements of Gerbracht upon the date of the discovery of the fraud (1781), received against him only, must have had a prejudicial effect on all the defendants. Again, the testimony of Mr. Whalley (1919), that he who had knowledge of the alleged frauds, was offered employment by Bendernagle after their discovery, although he had been refused only a week before, was as a

matter of record received only against the defendant Bendernagle. The testimony of the witness Morgan, who succeeded the defendant Bendernagle as cashier of the refinery (1997), that important books and documents were missing from the refinery, was limited of record to the defendant Bendernagle; and the testimony of Poole, who succeded Gerbracht (2003-2028), that letter-press books, letters, technical statements and other important papers were missing from the Superintendent's office, was limited of record to Gerbracht.

The record is replete with testimony of this damaging character, most of which was received upon the theory that its injurious effect on all the defendants could be avoided by limiting its admission to certain defendants and by general instructions to disregard. Assuming the efficacy of this method in an ordinary case, it is submitted that in a trial lasting for weeks, the record of which covers upwards of 1,000 printed pages, it was beyond the bounds of human probability that the jury should have kept accurately distinct the evidence admissible only against the other defendants or should not more or less unconsciously have been much influenced by the miasma arising from that great mass of evidence as to happenings upon the docks and at the refinery, which was utterly incompetent as regards the defendant Heike.

No man can receive a fair trial if he is forced to stand in a background of fraud and knavery created by the acts of others but which necessarily threw their dubious gloom over his own conduct and impart a sinister significance to his most innocent acts.

In *White, et al.* v. *The People*, 81 Ill., 338, the Supreme Court of Illinois reversed a judgment for failure to grant a severance. The court said:

"These questions arise chiefly from the fact that both parties were tried by the same jury and many portions of the evidence competent as against one, were not competent as against the other; and still, in effect, very damaging to the party against whom such testimony was not competent. In such case it is very difficult for a juror to divest himself, under instructions, from the illegitimate effect of such evidence upon the entry who ought not to be affected thereby."

In *State* v. *Oxendine*, 107 N. C., 783, the following from the opinion is particularly applicable:

"It is believed by some that even the most painstaking efforts of the Judge will often fail to efface from the minds of the jury the influences made by hearsay or other incompetent testimony, and the task is rendered all the more discouraging by the repetition of such testimony in the arguments of counsel, directed, as they are, in the interest of their respective clients. It is said that it requires the highest exercise of the intellectual faculties to free the mind from erroneous opinions founded upon improper testimony, and that so great is the infirmity of man that often the most severely trained intellects are incapable of accomplishing so gratifying a result."

(2). The defendant Heike was placed in a false position by reason of the fact that he was obviously chosen by the Government as the representative of the officers and directors of the company against whom the press, the public and the administration had been urging action.

Assuming that the jury were satisfied of the existence of a conspiracy to defraud the Government, it was but human that they should seek a

man "higher up," on whom to place the responsibility for the criminal action of the lesser employees who were being convicted by them or who were pleading guilty before them; and so would not require such convincing proof as would have been required if Mr. Heike were being tried separately and exclusively for his own acts. Assuming, as we must, that the jury were satisfied that an offense against the public revenue had been committed, we have the not unlikely condition of twelve men before whom had been consistently developed a plot and conspiracy calculated to excite their indignation as honest men, allowing their minds to leap from an abhorrence of the *corpus delicti* to the guilt of a man thrust forward by the government as representing those who had tolerated and encouraged the offence, without searching analytically for the establishment of the necessary connection. The jury would, as the inevitable psychology of the matter, not be inclined to convict the lesser employees whose guilt was made evident by the confession of some of them, and at the same time let go the man thrust forward by the Government as the man "higher up," "the Wall Street end," of the fraud upon the docks.

The verdict of the jury would under such circumstances inevitably tend to be a verdict against Heike, as the embodiment of those in control of the affairs of the company, rather than a verdict against Mr. Heike as an individual.

(3). In addition, the defendant was greatly prejudiced by the fact that during the course of the trial three of the other defendants pleaded guilty. This turn of events should, it is submitted, have induced the court to grant to the defendant Heike a separate trial.

The reasoning in *United States* v. *Matthews*, Fed. Case No. 15741 b, shows the gravity of the prejudice to the defendant Heike which inevitably followed these pleas of guilty:

"A learned and judicious writer on evidence says *it is morally impossible* that the hearing of confessions of one prisoner implicating others should not operate to the prejudice of the parties implicated, notwithstanding the instructions of the court to the jury to the contrary. 4 Starkie, Ev.. 54, note t."

In *Krause* vs. *United States*, 147 Fed. (C. C. A.) 444, it is said:

"Where it becomes apparent to the presiding judge in the progress of the trial that injustice may be done to any defendant by such joint trial, it is to be presumed that he will afford relief by awarding a new trial."

(4). It may be conceded that the lower court had discretion upon the motion for a severance.

United States, v. Marchant, 12 Wheat., 480.
United States v. Ball, 163 U. S., 662.

It does not follow from this, however, that the granting or denial of the motion is not subject to review by this Court. The Supreme Court of the United States has repeatedly held that the manner of the exercise of discretion is reviewable. As was said by Mr. Justice Lurton then upon the Circuit Bench, in *O'Connell* v. *Pennsylvania Co.*, 118 Fed. (C. C. A.), 991, with regard to other matters resting in discretion:

"While we are disposed to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross examination and in respect to the order in which evidence is to be introduced, yet we must

reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary."

It is doubtful if the Federal courts recognize any exercise of discretion as not under any circumstances reviewable upon appeal. Opinion of Chief Justice Marshall, in *Osborne* v. *The Bank*, 9 Wheat, 738, 866.

In *Krause* v. *United States* 147 Fed. (C. C. A.), 444, the court sets forth, as the occasion when an order denying a separate trial is not reviewable:

"The absence of clear indications that serious prejudice resulted therefrom to one or more of the defendants."

This is very far from the proposition that the denial of a separate trial is never reviewable. As a matter of fact, courts have frequently reversed judgments in criminal actions for failure to accord a severance.

Thus, in *White* v. *People, supra*, the Supreme Court of Illinois made such a reversal. In *Morrow* v. *The State* 1½ Lea (Tenn.), 483, the Supreme Court of Tennessee directed a like reversal, and said:

"We are of opinion that the ends of justice would have been better subserved, and the offences with which the defendants were charged were so distinct and separate as to require that a severance in the trials should have been had, and the defendants respectively been allowed the benefit of the testimony offered to the extent that it was competent, as above indicated, the refusal of

So, also, in *Watson* v. *The State*, 16 Lea, 604; and in *State* v. *Desroche*, 47 La. Ann. Rep. 651. In the latter case the court said:

"*Unless, therefore, the application for the severance rests entirely in the discretion of the court, to be refused without reason, and when there is manifest reason for the application, we must hold that the refusal is subject to review in this court,* and on the showing made in the bills we think this court is bound to grant relief."

POINT VII.

It was error to convict Petitioner on the Sixth Count, for Conspiracy.

(Assignment of Errors Nos. 27, 28, 29, 92, 93; fols. 4199, 4200, 4204, 4340, 4341.)

It is a dreadful abuse to suffer the conviction of a prisoner for conspiracy to commit an offense, when the same evidence, if sufficient for any purpose, ought to prove the offense itself; and this is the opportunity to correct it. For it is a common thing nowadays, when there is not enough evidence to convict a man of a definite crime, for lack of positive connection with it, to charge him with *conspiracy* to commit it. Of course there is a crime of conspiracy, distinct from the crime itself; its essence is the agreement, *aggregatio mentium*, to commit the offense; so that a party may be guilty, and he may be found guilty if the evidence suffices to prove that he entered into the conspiracy, although he did not go further and take a hand in the crime itself. But this is not the

abuse of which we speak; oftentimes there is no more evidence of the prisoner's conspiring than of his participating in the crime; as in the case at bar, his connection with both conspiracy and crime may be the same, his imputed responsibility as the "man higher up," the legal relations, supervision and understanding between an officer and the employees of a corporation, and if they show a conspiracy they are sufficient to prove him a *particeps criminis*.

The peculiarity of a conspiracy is its esoteric nature; it is committed in the mind; it is most difficult to prove by itself. For this reason proof of the crime of conspiracy, without an overt act, is no longer permissible in this country, as it was at common law. The conspiracy, however, may be deduced from overt acts; a legitimate deduction may be drawn that the acts were committed in pursuance of a prior conspiracy. But in nine cases out of ten the overt acts will show that prisoner participated in the crime itself just as well as in the conspiracy; and if, as in the case at bar, the verdict was right in finding him not guilty of participating in the crime charged, it was by the same token wrong in finding him guilty of conspiracy.

Nevertheless it has become customary for prosecutors to charge conspiracy rather than the commission of actual crime, in their indictments, especially statutory crimes of the class under consideration. Although relying on the same evidence, they find it easier to convince a jury of secret conspiracy than of a palpable crime; it opens the door to metaphysical speculation in place of dry proof; the inquiry is into intentions rather than acts; it is a reversion to all the evils of the old practice when the trial was of a conspiracy

in the minds of the conspirators without overt acts to show it. It is this abuse we complain of; and we adopt the protest of Judge Holt. He was overruled in the case, but not on this point:

"There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but when a crime has been actually committed by two or more persons there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate commerce act, the Sherman act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiraries to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word 'conspiracy.' If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords . . . and that bar cannot be lifted by a prosecution for a conspiracy to commit that crime."

U. S. v. Kissel, 173 F. R. 823, 828.

This abuse can be traced to its logical consequences in the case at bar. Heike was indicted for the crime of fraudulently underweighing sugar imported through the Customs House and also

for conspiracy to commit that fraud. It is not pretended that Heike had any direct knowledge or participation in the sugar weighing; that was done by employees and government agent at the docks in Brooklyn while Heike was sitting in the Company's office in Wall Street. The chief object of the evidence introduced, and the issue remaining to try, was to *connect* Heike with the active sugar weighing; and this was done by showing his official relations and inferential knowledge, aid and abetting.

We do not think, ourselves, that the evidence was sufficient to connect him either as a conspirator or as a participant in the fraud—we are not now speaking of the connection between Heike's testimony and the discovery of the frauds—that is sufficiently disposed of by the court below in its opinion—we are speaking of his personal connection with the perpetration of the frauds.

"But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. There must be shown some sort of active participation by the parties charged. Of this we have an illustration in an English trial before Martin, B., where certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire. It was held, that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood and knew of the devices used to conceal it, was not sufficient to sustain the charge of a fraudulent conspiracy between the employers and servants. There must be concurrence in the common design. And we may also hold that mere sym-

pathy with a conspiracy, not exhibiting itself in overt acts, does not make a person a co-conspirator."

Wharton's Criminal Law, §1402.

But our present point is, not that the evidence in the case was necessarily insufficient to connect Heike with the sugar frauds, but that, whatever the evidence was, if it were sufficient to connect him as a conspirator it was sufficient to connect him as a participant, and *vice versa* if it were insufficient to connect him with the perpetration of the frauds it was insufficient to connect him with a conspiracy to commit them.

Yet the verdict and the judgment herein find, upon one and the same evidence, that defendant was not guilty of participating in the crime charged, but guilty of conspiracy to do so. The first four counts in the indictment accuse defendant with committing the crime against the revenue law; the last two accuse him of conspiracy to commit the crime. He was found not guilty on any count but the last. It is not pretended that Heike participated directly in the commission of the criminal fraud; and the only evidence offered was of his indirect connection with it, as aforesaid. But that evidence was equally competent and efficient to prove participation or conspiracy. We claim, therefore, that the verdict of not guilty on the first four counts was virtually a verdict of not guilty on the conspiracy counts; the finding of no evidence of participation meant that there was no evidence of conspiracy in the case. The verdict ought to be set aside for inconsistency.

But aside from that point the anomalous and inconsistent situation in this case illustrates the principle of the thing, as Judge Holt gave it, the

danger of indictment, and the fallacy of conviction, when if there be any evidence to connect the prisoner with the crime, he should be prosecuted as *particeps criminis*, and not as conspirator. And for that reason the verdict should be set aside.

POINT VIII.

The circumstantial evidence, from which alone the jury inferred petitioner's participation in and knowledge of the frauds in question, was not legally sufficient for those purposes; the learned Trial Court erred in allowing the jury to draw such inference, and the learned Court of Appeals erred in affirming the judgment in that respect.

(Assignment of Error, Nos. 28, 29, 92, 93; fols. 4200, 4204, 4340-1.)

The evidence against Petitioner was purely circumstantial. There was no evidence of direct participation in the sugar weighing frauds, but the situation of the parties, Petitioner's duties, the system of doing business, and Petitioner's part in it; and the Government's claim was that these showed knowledge of what was going on, and that knowledge was connivance, and connivance participation. The decision of the Court of Appeals specifies these particulars:

"The government showed that there came before these defendants monthly statements, which contained disclosures as to intake and output of the refinery which it was contended indicated that the government weights were uniformly abnormally short, except during the brief period when disputes as to rebates produced a temporary cessation of the tampering with the scales. As to Heike it was shown that he took action to effect a change in the methods of bookkeeping by making additions to the intake figures after they reached headquarters, which it was contended was consistent only with knowledge that the government weights were being abnormally reduced and with intent to cover up the transaction. Statements made and action taken by Gerbracht were testified to, which it was contended were consistent only with guilty knowledge and participation. Letters written by both defendants were put in evidence. Finally they both took the stand, were examined and cross-examined at great length—a cross-examination in which some of the jurors participated. Of course if the jury had credited their statements explanatory of the matters relied upon against them, they would not have convicted. But with those explanations set aside—as upon the verdict we must set them aside—there was sufficient in the record to warrant a finding of knowledge and participation on the part of each." (Record p. 1661.)

The circumstances cited against Petitioner are all explained away in the statement of facts prefaced to Part II; when rightly understood, they are entirely consistent with innocence, and any inference of guilty knowledge or participation can be only pure surmise and speculation. We believe the inference was based on two facts only: 1st, that it was evident, as the Court said, "that some one or more persons besides these understrappers (the employees who tampered with the

scales) were cognizant of the facts that sugars were being underweighed" (Record 4979); 2dly, that Petitioner was a "man higher up."

The case against Gerbracht was entirely different from that against Petitioner, so far as constructive knowledge and guilt are concerned. The *Monthly statements* referred to by the Court are explained in the Statement of Facts under the head of the duties of the secretary; they were prepared from reports made by others; they showed financial results, but did not bring him into contact with the Raw Sugar or Refinery departments otherwise; the profit and loss varied from time to time as according to the kind of sugar imported and the distance from which it came; and that the profits were lowest from the Brooklyn refinery at whose docks these frauds were going on. There was surely nothing to put the Secretary on inquiry in them. The circumstance of Petitioner endorsing the four cheques is explained in the Statement under the subheads, "Chief Fiscal Officer" and "Refunds of Duty." They were given to refund the Company for overpayment of duty, given to release imports from bond pending official weighing. Such refunding cheques came with every importation; they varied greatly from cargo to cargo, and there was nothing to excite the treasurer's suspicion. His practical ignorance of the details on which financial reports came to him is shown under the subhead "Overseer of Refineries." The cessation of shortage during the "so-called non-interference period" is explained under that subhead. The relative weighing of the Custom House and that of shipper and importer of sugar was constantly changing; similar cessation of loss of weight had occurred before for short periods, and

there was nothing in the circumstance to excite special suspicion; and so far as these discrepancies did attract Petitioner's attention, the Witherspoon letter of Sept. 19, 1907, will show how innocent he was regarding the cause (See subhead "Loss of Weight in Voyage"). Petitioner's efforts to improve the system of bookkeeping is also explained under the subhead "System of Bookkeeping, not to Conceal," and surely no wrong could be inferred from it. The Turner letter is explained, under that head, and other letters show that they afford no ground for imputing constructive notice of the frauds in question. The Stranahan Conference is explained under that subtitle; it could not be thought to give notice of these frauds.

We claim, therefore, that the learned lower court erred in ruling that there was sufficient evidence to warrant a finding of knowledge and participation.

POINT IX.

The learned Trial Court committed reversible error in admitting in evidence the so-called "pink books."

(Assignment of Errors, Nos. 48, 49, 51 to 63; fols. 4258, 4264, 4271, 4277-4294.)

These books were called pink books and were kept in lead pencil by men employed by the American Sugar Refining Company to keep check or

tally on the city weighers who weighed dutiable sugars. The entire process of weighing was done by the city weighers. They weighed the drafts and called out the weights of each, to the checkers who jotted them down in the pink books. *The entries* of the weights in the pink books *were based upon what the city weighers called to the checkers.* The checkers took no part in the weighing, and very rarely looked to see what the scales recorded. Some of the checkers were put upon the stand by the government. *None of the city weighers who did the weighing and knew the weight of the drafts was called. The government did not prove that the city weighers were dead or unavailable.* The books were books of the American Sugar Refining Company. Petitioner had nothing whatever to do with the books, and had no knowledge of their contents (Record, fols. 1479, 1480, 1534-7, 1629, 1664, 1678, 1593, 1522, 1629, 1672, 1480, 1643, 1651, 1659-1661, 1694).

The entries in the pink books were employed by the prosecution to show the weights as taken by the city weighers, and thus prove discrepancies between them and the government's weights. The city weighers themselves were not called (fols. 1850, 1855).

The Court of Appeals further explains these books, and its grounds for admitting them (Record, fols. 4960-8). The holding of the Circuit Court of Appeals that these books were competent and admissible is in direct conflict with the authorities.

In *Chicago Lumbering Co.* v. *Hewitt*, 64 F. R. 314, the entries in the books of a witness who had set down therein the quantity of logs scaled, the

basis of the entries being the declarations of the man who had done the scaling, were rejected, the Circuit Court of Appeals for the Sixth Circuit, Lurton, J., saying:

"If McFadden had made his entries from oral statements made by person having knowledge of the number and contents of the logs floated each day, *such entries would not have been competent without calling the persons who knew the facts* and on whose authority the entries had been made." (Italics ours.)

In the case at bar the entries in the pink books were made by the checkers from oral statements made by the city weighers. The city weighers knew the facts. It was on their authority that the entries were made. No city weigher was called.

In connection with the claim that the rule should be extended, the court further said:

"To extend the admissibility of books founded on the declaration of absent or dead witnesses is not authorized by decided cases and would not be justified by our idea of a wise policy." (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit holds that such entries are not competent without the evidence of the persons who know the facts—in the case here the city weighers.

In *Kent* vs. *Garvin*, 1 Gray 148, the Court at page 150, said:

"It is manifest that here an important link in the chain of evidence is wanting. The clerk who made the entries had no knowledge of the correctness of any charge on the book. All he could say is that the drayman who delivered the articles for the plaintiff gave to him from his memorandum book the items which were entered on the book.

The case, therefore, rests upon the mere unsupported testimony of a third person, whose fidelity and accuracy there was no means of ascertaining and testing. It is in its nature mere hearsay testimony. To permit the books of a party to be competent proof under such circumstances would be extending the rule applicable to this anomalous and dangerous species of evidence quite too far." (Italics ours.)

The same rule has been affirmed in the recent case of *Gould* vs. *Hartley*, 187 Mass. 561.

In *Norwalk* vs. *Ireland*, 68 Conn. 1, a memorandum of an inventory identified by a witness as made in part from his own inspection of goods and in part from information given him, was rejected as evidence, the Court saying, page 13:

"The memorandum was not proved to have been made under such circumstances as to make a correct statement of details, as they were then known to the witness who made the memorandum. *It testifies to matters to which the witness is unable himself to testify*, not from lack of recollection, but *from want of personal knowledge. No case in any jurisdiction has gone so far as to admit memorandums which fail in this essential.*"

In *Swan* vs. *Thurman*, 112 Mich. 416, the Court said:

"It is sometimes proper to admit books of account as evidence of the acts of those who keep them, where the entries are contemporaneous with the acts recorded; *but where the book is*, as in this case, *the record of the acts of others not within the personal knowledge of the bookkeeper, but made up from the statements of others, such book is hearsay.* From the earliest cases, the admission of entries by third persons has proceeded upon the theory that such persons had personal knowledge of the fact stated in the entry."

In *People* vs. *Mitchell*, 94 Cal., 550, the Court at page 554, said:

"The prosecution, against the objections of the defendant, were permitted to show, by the local agent of the railroad and the night operator, that by the rules and regulations of the company, the trains must not arrive before their schedule time and that the conductor must register the exact time of arrival and departure; that such register was in fact kept at this station. The register was then introduced, defendant objecting, from which it appears that the train arrived and left on the night in question on schedule time. *Neither of the witnesses had any actual knowledge of the times, nor was the conductor who made the record, called as a witness. The evidence was clearly incompetent and was immaterial in the highest degree.*"

In Price *vs.* Standard Life, etc. Co., 90 Minn., 264, the Court, p. 269, said:

"The witness (hospital superintendent) had no personal knowledge of the patient, and had no recollection of the case apart from the record. Therefore, *the entries amounted to nothing more or less than what the superintendent wrote in the register what the attending physician told or reported to her* concerning Price's illness. *To permit these entries to be introduced in evidence was to disregard in a very noticeable manner the rule forbidding the introduction of hearsay testimony.*"

The question has not been passed upon by this Court, although in the case of *Chaffee* vs. *United States*, 18 Wall., 516, its attitude is somewhat shown.

The question is an important one, of constant occurrence in suits brought by the Government, and there should be reversal on this ground alone.

The admission of this hearsay evidence, in addition to the ordinary error, violated the right of accused to be confronted with the witnesses against him.

United States Constitution, 6th Amendment.
Motes v. United States, 178 U. S., 458.
Kirby v. United States, 174 U. S., 47.
Cooley on Constitutional Limitations, 7th Ed., p. 451.
People v. Bromwich, 200 N. Y., 385.
State v. Thomas, 64 N. C., 74.
United States v. Angell, 11 Fed. 34 at 43.
People v. Goodrode, 132 Mich. 542.

POINT X.

The Trial Court committed reversible error in allowing in evidence acts and declarations of a co-conspirator thirteen years prior to the conspirator.

(Assignment of Errors Nos. 35-9; fols. 4221-4233).

The fifth count of the indictment charges that the conspiracy to defraud the United States was entered into on *March 1, 1907*. (Record, pp. 18, 19).

The sixth count of the indictment charges that the conspiracy to commit offenses against the

United States was entered into *March 1, 1907*. (Record, pp. 27, 28).

In behalf of the government, Spitzer, an alleged conspirator, testified that he remembered when the tariff was first placed on sugar by the Wilson bill in 1894. Then followed this testimony, received over objection. (Record, pp. 575, 576):

"Q. Did any transactions occur on the dock which resulted in the underweighing? A. There was, yes, sir.

Q. Mr. Spitzer, will you state in your own language what you ascertained about that?

Q. I am speaking about the matters of your own knowledge? A. *In respect to that in 1894*?

Q. Yes. A. Mr. Leroy, *at that time*, telephoned me to come over and stated there was quite a row over there on account of letters which came."

After some testimony *definitely fixing the time as in 1894 or 1895* (Record, p. 576), this testimony was admitted over objection. (Record, pp. 577, 578):

"Q. Do you know whether those weights were being affected by the action of your checkers *at that time* in any way? A. Yes, sir.

Q. Do you know what they were doing? A. Yes, sir.

Q. What were they doing? A. They were putting a weight on the rear end of that poise (indicating) there and after the scale was placed, the weight was taken off.

Q. Just illustrate on the plan behind you. A. (The witness then illustrates.)

Q. In what way would they affect the weights by so doing? A. By putting a 500-pound weight there, that was taken out and naturally it would make a difference in the weight, I think in the neighborhood of 35 or 40 pounds in a draft weighing about 800 or 900 pounds. That was being done with my knowledge. *I reported that back to Mr. Leroy.*"

Richard Whalley, a witness called on behalf of the government, testified that he remembered the time that duty was imposed on sugar *in 1894* and that *at that time* he tampered with the scales employed to weigh the sugar.

Over objection the following testimony was admitted (Record, pp. 638, 639):

"Q. Did you have any conversation with Mr. Spitzer *at that time*? A. I did.

Q. What was it? A. Mr. Spitzer stated that the government weighers were pretty close weighers and that trucks would accumulate sugar and roll the ball. I understand what he meant by 'roll the ball.' I did that afterwards. This ounce ball by turning it towards you throws the balance off, depreciates the weight. By rolling it one way it depreciates the weight and by rolling it the other it increases it. *This took place right after the duty went on sugar the last time.*"

It will be noted that not only did the trial court admit evidence of Spitzer's acts and declarations in 1894 or 1895, *but admitted evidence of the acts, in 1894 or 1895, of Whalley and Leroy, strangers to the conspiracy.*

In *Logan* v. *United States*, 144 U. S., 263, and in Brown v. United States, 150 U. S., 93, this Court laid down the rule that "*after the conspiracy has come to an end*, whether by success or by failure, *the admissions of one conspirator* by way of narrative of past facts *are not admissible in evidence against the others.*"

In *Train* v. *Taylor*, 51 Hun. (N. Y.), 215, the Court, p. 217, said:

"Now, it is clear that as far as the defendant Taylor was concerned, and as far as this action was concerned, *the representations made to a*

commercial agency two years before the alleged conspiracy could not be evidenced against either of the parties. * * * The representations made, prior to the forming of this conspiracy, by the Kendals to the mercantile agencies may very well have been competent in an action against them for obtaining goods upon fraudulent representations, but they had nothing whatever to do with this fraudulent conspiracy, and *their declarations made prior to the formation of the conspiracy could in no manner affect the defendant Taylor.*"

In *State* v. *Crofford*, 121 Iowa, 395, the Court, p. 403, said:

"The rule which allows the statements of one co-conspirator to be given in evidence against another is a marked exception to the general rule which excludes hearsay testimony, and applies only where the statements are made pending the conspiracy and in furtherance of the unlawful purpose. *Statements made by a conspirator before the conspiracy was formed* or after it has been accomplished, *fall within the general rule and are not admissible except against the person making them.*

Such is the doctrine which has been repeatedly announced in this state, and, so far as we are aware, of universal prevalence in all courts administering justice according to the common law."

In *Williams* v. *Dickinson*, 28 Fla., 90, the Court said:

"The evidence of W. L. Garrett related to declarations made to him by Prior Wheeler as to what was said by Williams to Wheeler *at a time long prior to the formation of the conspiracy*, when there was no conspiracy in existence, and, when communicated to Garrett, there was lacking the foundation upon which such evidence is ever admitted, viz: the conspiracy. At the time Wheeler told these things to Garrett, *Wheeler*

was not a co-conspirator with Williams, and therefore, his declarations to a third party, under this rule, could not bind Williams and were inadmissible as against Williams."

Wilson *v.* People, 94 Ill., 299.
People *v.* Irwin, 77 Cal., 494.
State *v.* Moberly, 121 Mo., 604.

POINT XI.

The judgment of the Court below should be reversed, with instructions to sustain the Plea in Bar and to dismiss the Indictment; or else, in case the Plea in Bar be overruled, with instructions to grant a new trial herein.

John B. Stanchfield,
George S. Graham,
Frederick Allis,
Of Counsel for Petitioner.

JAN 10 1913
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

No. 520.

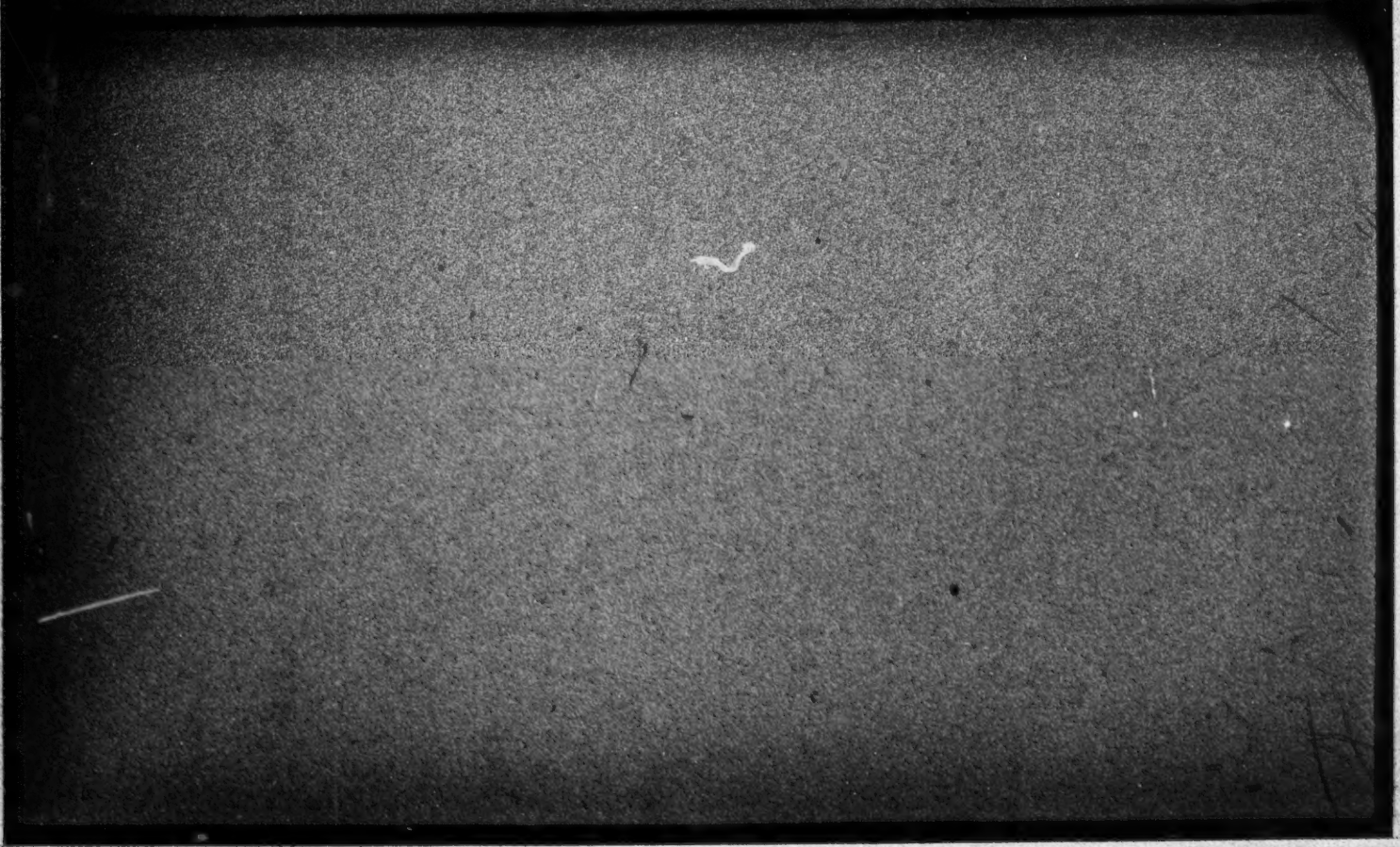
CHARLES R. HEIKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

JOHN B. STANCHFIELD,
Counsel for Petitioner.



INDEX.

	Page
Question arising on the pleas at bar	1
1. The respondent's brief is but a reversion to the original position taken by the Government at the trial	1
2. The irreconcilable conflict between the points set forth in opposing briefs	4
3. In reply to respondent's point that Heike's testimony did not "concern" the offense for which he was indicted	7
4. In reply to respondent's second point on the question of directed verdict	9
On the question of guilt or innocence	11
1. In support of point VI of our main brief	11
2. There are errors in respondent's statement of facts from which it seeks to deduce petitioner's knowledge of the frauds and conspiracy with the actual perpetrators	15
3. That the secretary must have been aware of the frauds because of the differences between the custom-house and settlement weights	16
Technical statements	20
Letter of C. R. Heike, September 24, 1897	24
3. In reply to respondent's brief, fourth point, and in support of petitioner's brief, point X	27

Index of Authorities.

Ball vs. U. S., 163 U. S., 672	18
Bentell vs. Magone, 157 U. S., 157	10
Brown vs. Walker, 161 U. S., 595	6
1 Greenleaf Ev., sec. 171	10
Hale vs. Hinkel, 201 U. S., 67	6
Holmes vs. Jones, 121 N. Y., 461	10
Lindsale vs. Delaware, 116 N. Y., 416	11
Mott vs. Consumers Ice, 73 N. Y., 543, 550	10
Panama vs. Napier, 166 U. S., 284	10
Pope vs. Allis, 115 U. S., 363	11
Sawyer vs. U. S., 202 U. S., 150, 160	10
Sparf vs. U. S., 156 U. S., 58	12
Story Eq. Pl., 265a, note 1	10
U. S. vs. Marchant, 12 Wheat, 480, 484	12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 520.

CHARLES R. HEIKE, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

PART 1.

Questions Arising on the Plea in Bar.

1. *The respondent's brief is but a reversion to the original position taken by the Government at the trial, namely, that the immunity statute is nothing more than the old witness privilege of the Fifth Amendment, in a different form, it is true, but subject to the same conditions and limitations.*

Our argument on the plea of immunity has been simple and consistent from the first. It consists of two propositions: (1) That the immunity statute was one of amnesty, and

when Heike went on the stand and took the witness' oath at the anti-trust inquiry he stood exactly as if he had a pardon in his pocket for everything concerning which he might testify; (2) that his testimony *concerned* the very offense for which he has been indicted, not directly—the offense was not the direct subject of the anti-trust inquiry, but indirectly—he gave tables of melting weights and other evidence that were essential to the proof of the offense. The very documents he produced may not have been put in evidence, but he *testified concerning* them. That is all the statute required to extend its immunity to this indictment.

The answer of our opponents to this argument has been more changeable. Their first position, as shown at the trial, in the charge to the jury, and by the Government's brief on error to the Court of Appeals, was that the immunity statute was merely an allotropic substitute for the constitutional privilege, from which they drew various arguments against the plea, the sum and substance of them all, however, being that Heike had never acquired any immunity, or had waived it if acquired, because the constitutional privilege, if he had pleaded that instead of the immunity statute, would have been unacquired or waived, under the same circumstances.

The Court of Appeals decided against us, but placed its decision on a different ground entirely. It discarded the ingenious simile on which the learned district attorney and trial court had proceeded; it conceded and assumed our second proposition, that the immunity, if acquired, extended to the offense charged (Record, fols. 4935-6); but it substituted a reason of its own for overruling the plea, namely, that Heike, being a corporate officer, testifying for the sugar company, and the corporation receiving no corporate immunity by statute, so he could receive no personal immunity. Of course, we do not mean to say that this is the exact logical form in which the learned Court of Appeals puts the proposition. What it says is that Heike was merely the "mouthpiece" of the corporation, and that it was really the corporation who testified, not Heike himself. But the

result is the same. The opinion is that an officer of a corporation who is subpoenaed and sworn in an investigation under the Sherman act, and then discovers the internal affairs of his corporation—the very purpose and *raison d'etre* of the statute—shall receive no personal immunity, because he spoke vicariously. That amounts to the same as the way we first stated the ruling, for it makes Heike comply with all the terms of the statute. He was the company's "mouthpiece" only because he was subpoenaed as an officer to give inside information concerning the company, and if he did not receive his personal immunity therefor the whole scheme of the statute would be upset (see main Brief, point IV).

Next, in the application for the writ, the Solicitor General rejected both the above methods of answering our argument for the plea in bar (see Brief of Sol. Gen. Lehman, also cited in our learned opponent's present brief). He admitted the statute to be one of amnesty—in principle, at least, although he did not pursue the principle to all its logical conclusions, as we do—virtually dropping all former arguments of the Government based on the assumption that the bar we had pleaded was of the constitutional privilege. He ignored the special ground on which the Court of Appeals had founded its decision, and conceding our first proposition, relied almost entirely upon objections to our second proposition, to wit, that the immunity which Heike acquired did not extend to the subject-matter of the indictment.

And now the Government has again changed its position. It returns to its first ground, that the immunity statute, being a mere substitute for the constitutional privilege which shields a witness from compulsory self-incrimination, the statutory immunity was not acquired by Heike because he did not comply with the conditions precedent attached to the acquisition of the constitutional privilege, or that he waived it without acquiring it, or whatever the arguments of our learned adversary may be on this point, which are stated in the Government's present and original briefs and in the charge to the jury. The present brief also incorporates the

point from ex-Solicitor General Lehman's brief contending that the immunity, even if duly acquired, does not *extend* to the crime for which petitioner has been indicted. It is, therefore, a contested point in the case whether the immunity acquired is confined to the subject of the investigation at which Heike gave his testimony, to wit, a violation of the Sherman act, or whether it extends to other offenses incidentally related or led up to by his discovery, and whether there is sufficient connection between the offense and the testimony, within the meaning of the statute, when the latter did not "concern" the former directly and *in toto*, but did "concern" a certain "transaction, matter or thing," *e. g.*, a table of "melting weights," that was necessary and essential to the discovery and proof, and was actually put in evidence to prove that offense. This, in our opinion (but we may be mistaken), is the only debatable question in the case. We have treated the point in point III of our main brief, and wish to add a few words more in this reply.

The adversary brief gives no serious discussion to the special point of the Court of Appeals, that a corporate officer who is compelled to testify against his corporation is not entitled to any *personal* immunity therefor. That point is treated in point IV of the main brief. Our learned adversaries confine themselves almost exclusively to certain ingenious deductions which they have heretofore advanced, and still maintain, drawn from a forced analogy between the statute and the constitutional privilege. We have already answered these fallacies in points I and II of our main brief, and wish to add but a few words.

2. *The irreconcilable conflict between the first and second points of petitioner's brief and the first point of respondent's brief arises from the impossibility of joining issue. It is a conflict of theories rather than of facts.*

Petitioner admits his plea would be bad if the immunity pleaded were merely the constitutional privilege against self-incrimination, because he has not complied with the condi-

tions attached to such privilege, but claims that his immunity bears no analogy to such privilege, and, on the contrary, is an amnesty or pardon from the sovereign people itself, subject to no conditions whatever except those nominated in the immunity statute. Respondent apparently admits the plea would be good if it were a case of pleading amnesty or pardon, but claims that the immunity here pleaded is not one of amnesty or pardon, but of constitutional privilege, or of witness' privilege against self-crimination similar to the privilege of the Fifth Amendment, and subject to the same conditions precedent.

Until the court determines on which theory the immunity in this case proceeds, on the theory of unconditional amnesty or on the theory of privilege against compulsory self-incrimination, any further argument along the line suggested by the first point of the adversary would be futile. The very statement of the adversary points "that none of Heike's testimony was self-incriminating" (pp. 7, 27), shows that they are founded on the premise that the immunity statute is nothing more than the constitutional privilege; and so of each item of his testimony, our learned adversary deeming it enough to rebut the plea, to show that Heike's testimony would not convict him of any crime (pp. 31, 32, 34, 35, 41). How can we argue such points pro or con without assuming the same major premise that the Government takes. The only precedent we know of for this immunity statute is the statute of amnesty to the Mormons (act of March 22, 1882). Now, suppose the Government to prosecute a Mormon for polygamy, and defendent to plead the amnesty statute in bar. How absurd it would be for the Government to reply that the immunity had been "waived" by not performing the conditions required for the acquisition of the constitutional privilege of witnesses! How could an amnesty or pardon be waived by not performing a condition that never occurred or could occur? The whole series of arguments in the first point of the adversary brief are founded on an erroneous theory, namely, that the immunity statute is

merely a privilege to shield witnesses against self-incrimination, to all intents and purposes like the constitutional privilege. When this court shall have established the true theory of the statute these arguments will fall like the house built upon sand. We freely admit, however, that if the court should sustain this theory that we allege to be false, all the arguments we have advanced in points I and II of our main brief will similarly disappear.

Of course the distinction must be preserved, which we have already pointed out, pages 38-9 of main brief, between the term *"substitute,"* in the sense in which this court uses it in *Brown vs. Walker* and other cases, and the extensive meaning and illogical consequences that our adversaries attribute to it. This court has itself called the immunity statute a "substitute" for the constitutional privilege. That was where a witness on the stand had pleaded his constitutional privilege, and it was overruled because the immunity given by the statute was a good and sufficient "substitute"—that is, the immunity from subsequent prosecution was just as effective a safeguard to his liberty as the privilege of not answering a question could possibly be. "A statute absolutely securing to him (witness) such immunity (by amnesty or pardon in advance) would satisfy the demands of the clause in question" (constitutional privilege). *Brown vs. Walker*, 161 U. S., 595 (parentheses ours). If there be no danger of prosecution, there can be no danger of self-incrimination (Hale *vs.* Hinkel, 201 U. S., 67). In such sense the immunity statute may be properly termed a "substitute" for the Constitution, but to draw therefrom the conclusions that will be found in the Government briefs here and in the court below, and in the judge's charge at *nisi prius*, is fallacious. How can a pardon or amnesty be subjected to conditions and limitations that hedge the privilege against compulsory testimony? The authorities cited for this extraordinary view, so opposed to the tenor of the opinions of this court (main Brief, p. 45 *et seq.*), are opinions in one of the Beef Trust cases and in a Wisconsin case—neither of a full bench, but of single

judges—and of a text-book writer (Respondent's Brief, pp. 11-5), and they are sufficiently criticised in our main brief, pages 48-50.

3. In reply to respondent's point that Heike's testimony did not "concern" the offense for which he was indicted (Respondent's Brief, pp. 9-10, 61).

We have already answered the arguments here advanced by our learned adversaries in point III of our main brief. The portion of former Solicitor General Lehmann's brief now cited in the adversary brief, is answered in point V.

The argument of the present brief against the relevancy of Heike's testimony seems to be conditioned on the acceptance of its first point; it everywhere speaks of the "preliminatory evidence" given by Heike not concerning the sugar-weighing frauds (Respondent's Brief, pp. 7, 9-10, 28, 59). And at the bottom of page 60 it seems to advance the claim that, even if the testimony did concern the offense, yet if it did not endanger the witness—that is, unless the testimony itself criminated him—he acquired no immunity. But there is no such limitation in the statute; that says the immunity shall issue when the witness testifies "concerning" the offense—not a word about the testimony itself being of a criminating nature or otherwise.

We wish to add two further remarks on this point. The statute is not a rule of evidence excluding the very testimony of the witness at a subsequent prosecution, but allowing him to be convicted by evidence derived from other sources. It is an amnesty from prosecution, by any evidence, for any transaction, matter or thing concerning which he testified. And when Heike produced a "table of melting weights," by which name the actual weight of the sugar received was known, and it was necessary to produce this table of Government weights in order to prosecute for the sugar-weighing frauds in question, he became personally immune from such prosecution; for no matter whether the

very document Heike produced was used at his trial, or other evidence of the "melting weights," he testified "concerning" them and they were an essential link in the prosecution; they were a "transaction, matter or thing concerning which" he testified and on account of which he was prosecuted. This table produced by witness Heike is the famous Special Trial Exhibit 18; and, although our courteous opponent has pronounced "absolutely untrue" our statement that this table concerned the offense for which he has been prosecuted (Respondent's Brief, pp. 30-1), yet the Court of Appeals was of a different opinion (Record, fols. 4935-6), and subsequent parts of the brief base this denial of relevancy upon the fact that the document in question was not itself of an "incriminating or even suspicious quality"; that "it did not concern them in any aspect in which they could possibly be indicative of guilt or significant in this case" (Respondent's Brief, p. 59). It is true that the evidence in question did not excite the petitioner's suspicions at the time, for he was innocent of the crime, as our adversary alleges; but it is sufficient that he gave testimony concerning the melting weights which was necessary to and actually used in the subsequent prosecution.

Our second remark is that unless the court now sustains our position on this question of relevancy *this whole base of litigation will be thrown back to where it was after the Counselman case. Brown vs. Walker* held that the immunity statute covered every offense the old constitutional privilege did; if it did not, it would not have been a sufficient substitute under the *Counselman* ruling. The constitutional immunity—such as it was—extended to such a case as that of this "table of melting weights," for though it was not the *corpus delicti* itself, it led up to the offense and was necessary to its prosecution (see main Brief, point III, pp. 77-86). The "concerning" statute must be as broad as the Constitution; the testimony given at an anti-trust inquiry must be held to "concern" every prosecution from which the

witness would be shielded by the Constitution. Unless the "concerning" statute does so, there is a casus omissus, covered by the Constitution and not by the statute. A witness cannot be compelled to produce a table of melting weights, or other evidence of the actual weight of imported sugar, lest it be used to discover and convict him of fraud on the revenue, or smuggling, or other secret offense. Unless this sugar-weighing fraud, led up to and substantially proved by this "table of melting weights" concerning which petitioner testified, be also held to be a transaction, matter, or thing concerning which he testified, as well as the table itself, then *Brown vs. Walker* was wrongly decided, and we are relegated to the position we were in at the close of the *Counselman* case.

The same argument is true of every item of evidence specified at pages 13-4 of the main brief. Each was a matter or thing concerning which petitioner testified. Each was used and necessary to his prosecution. Although his former testimony may not have been put in evidence, the matter or thing was, and he testified concerning it, and therefore concerning the crime which they were used to prosecute.

4. *In reply to respondent's second point on the question of directed verdict* (Government Brief, pp. 61-2).

At the close of the special trial the Government moved the court to direct a verdict; the court did so, and petitioner—then defendant—excepted (1 Record, fols. 816-7), moved for arrest of judgment on account of said order directing said verdict (2 Record, fol. 4112), and assigned the same as error herein (2 Record, fols. 4166, 4343).

The fact that the petitioner also moved for a verdict at the same time was not equivalent to a stipulation to submit the case to the court without the intervention of the jury. It was an affirmation by both parties that there was no disputed question of fact, and a request that the court find the facts. The facts being thus submitted to the trial

court, this court must affirm his ruling if there was any evidence to support it.

Beutell vs. Magone, 167 U. S., 167.

We claim that the court can now review the court's direction of a verdict, because he must be held to have followed the pleadings, finding the facts as there admitted, and founding his order upon the grounds assigned in the replication for dismissing the plea. This is different from any claim of estoppel of record. We claim that the action of the *nisi prius* judge was equivalent to directing the jury to find the facts—such as the relevancy of the testimony, whether it "concerned" the subject-matter of the indictment, etc.—as alleged in the plea and confessed in the replication, and directing it to find the legal question of the validity of the plea in bar on the special grounds of avoidance set forth in the replication.

Stephen on Pleading, 283-5.

In this way the court can now review the trial court's action, and should reverse upon the undisputed evidence of the pleadings alone. In addition to what we have said in our main brief on this head (pages 10-2, 90), we summarize our argument:

There must be either a traverse or a confession and avoidance.

This replication does not do both.

If it did, it could be stricken out.

The traverse here is really a confession and avoidance.

The facts stated in the plea are not denied except as to their legal effect—that is, as the validity of the plea in bar is avoided by the new matter following such qualified denial.

The new matter in avoidance should have been overruled and the facts stated in plea allowed to stand admitted.

1 Greenleaf Ev., §171.

Story Eq. Pl., 265a, note 1.

Mott vs. Consumers Ice, 73 N. Y., 543, 550.

Linsdale vs. Delaware, 116 N. Y., 416.

Pope vs. Allis, 115 U. S., 363.

We now wish to raise the question of what was admitted by the pleadings, not as an estoppel of record, but upon our exception to the *nisi prius* rule directing verdict for the Government and refusing to direct verdict for defendant.

> "Statements and allegations in pleadings are always in evidence for all purposes of the trial. They are before court and jury, and may be used for any legitimate purpose."
>
> Holmes *vs.* Jones, 121 N. Y., 461.
> Pope *vs.* Allis, 115 U. S., 363.

Part II.

On the Question of Guilt or Innocence.

1. In support of point VI of our main brief.

Respondent relies upon the rule of practice that it is a matter of *discretion* with the trial judge whether he shall try defendants jointly or severally. That is the undoubted law. But it is a discretion that may be reviewed here. On a writ of certiorari, especially, this court is subject to no limitations upon its revisory jurisdiction; the whole record is before it for examination.

Panama *vs.* Napier, 166 U. S., 284.

And the discretion of the court below is replaced by the court above, and its discretion may be corrected as well as errors of judgment.

Secondly, the refusal to grant a separate trial was an *abuse of discretion*, which the upper court can always correct. And we wish to add to what we have said in point VI of our main brief a discussion of the authorities to show that there is nothing to the contrary preventing this court reversing the discretion of the lower court, for abuse, under the special circumstances of this case.

As in a criminal trial power of selecting his jury belongs, by common law, to the prisoner, he cannot demand as matter of right, a separate trial to enable him to exercise such right.

U. S. vs. Marchant, 12 Wheat., 480, 484.
Sawyer vs. U. S., 202 U. S., 150, 160.

The stress of this proposition should be laid on the last case—*"to enable him to exercise such right."* In the *Marchant* case the prisoner had demanded a separate trial, on the ground that otherwise he would be prejudiced in his right to select a jury from the panel, in that in a joint trial one prisoner may wish to challenge a juror whom the other may wish to retain, and *vice versa*. But the court held that, at common law, the right to challenge was a right to *exclude* jurors, not to select them, and therefore it did not lead to the right of separate trial as claimed by the prisoner. The decision, therefore, goes no further than to hold that the separate trial cannot be demanded on that specific ground.

In *U. S. vs. Gibert*, 2 Sumner, 63; 25 Fed. Cas., 1303, Mr. Justice Story, who also wrote the opinion in the *Marchant* case, gave a second opinion, denying relief where the trial judge had refused a motion to separate made by prisoners accused of piracy, the ground of the motion being that each wishes to call the other as a witness. The court placed its decision upon the ground that separate trials would make no difference in that respect. The question of abuse of discretion was not raised.

And in *Ball vs. U. S.*, 163 U. S., 672, the court went into the question, holding that, as a matter of fact, "it does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together."

Our point is that it is an abuse of discretion to refuse a motion for a separate trial demanded on such a showing as we have made, that a joint trial would prejudice the prisoner's chances of fair trial. And the introduction of evi-

dence of direct participation in the sugar-weighing frauds, while proper against the actual participants in the fraud, would be unduly prejudicial to the interests of joint defendants whose only connection with the frauds was by constructive knowledge and connivance implied from circumstances. And refusal of the trial court to separate the trials, in such a case, would be abuse of discretion, for which a judgment of conviction should be reversed.

Sparf *vs.* U. S., 156 U. S., 58.
Ball *vs.* U. S., 163 U. S., 672.

And this error of discretion would be repeated as the evidence came in at the trial, showing the prejudice of a joint trial, and on the motion to direct a verdict, and in arrest of judgment.

C. C. A., 1st circuit, Holmes, Putnam and Aldrich, thus describe what would be the "inconvenience" of trying prisoners together, in language that would seem to indicate that the award of joint trial in such cases would be an abuse of *nisi prius* discretion:

> "It is rarely either convenient or safe or conducive to justice for an *accused* person to be put to trial at the same time and before the same jury for a very large number of offenses, even of the same class * * *. It may be convenient for the United States, and undoubtedly assists in obtaining convictions, to put before a jury a mass of evidence bearing more or less pertinently on the whole group of alleged numerous offenses, which would not be admissible if only one were in issue; but experience has sometimes shown that the inconvenience *to the accused* coming therefrom *rises to the danger point.*"
>
> Betts *vs.* U. S., 132 F. R., 228, 236.

Not only was it an abuse of discretion to subject a defendant chargeable, as Heike was, by constructive knowledge, to the full prejudice of joint inculpation by evidence of actual participation, admissible against codefendants only,

but there was further abuse of discretion by the trial court in admitting this direct evidence of fraud without expressly granting and charging the jury not to consider this evidence at all in weighing the case against Heike.

Sparf vs. U. S., 156 U. S., 52, 53:

"It does not appear that there was any abuse of that discretion (non constat, but if there had been there would have been good ground for reversal) in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others (*Sparf vs. U. S.*, 156 U. S. 51, 58). On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its inadmissibility against them, the court at once said, in the presence of the jury, that, as to defendants, it would be only evidence against him, if he said anything."

Ball vs. U. S., 163 U. S., 672.

But the court in this case let in the evidence indiscriminately against defendants of all classes and degrees of culpability and participation. And in our main brief, point VI, we show how the refusal of separate trial, especially without the safeguard taken in the *Sparf case*, of warning the jury to discriminate between Heike and the other defendants, when considering the evidence that was special and confined to the case against the codefendants, is an abuse of discretion.

In the review of proceedings below, opened up by this writ of certiorari, the Supreme Court has the same jurisdiction to review the discretion, and reverse for abuse or perversion of discretion, that the appellate division of New York, for instance, has to review the discretion of a trial judge.

3. There are errors in respondent's statement of fact, from which it seeks to deduce petitioner's knowledge of the frauds and conspiracy with the actual perpetrators.

Petitioner does not deny the actual commission of the frauds in question. His defense is that he did not authorize or participate therein. Most of the recital in respondent's brief, pages 43 to 60, is a description of the *method of perpetrating the fraud*. It was done clandestinely, by tampering with scales, etc., and the fraud excited great popular indignation, which reflected on every one connected with it. This evidence was proper for the purpose of proving the primary fact of actual commission of the frauds, and to appeal to the jury, but it has no place here. Petitioner's defense was that he knew nothing of the fraudulent acts. The evidence against him is all circumstantial. It is constructive knowledge inferred from the circumstances of the case. These are stated in our main brief, pages 116-130. If knowledge and participation can be imputed to petitioner, it must be inferred from some of these facts. Some of them have received, what we believe to be, an unfair gloss, amounting to misconstruction, in respondent's brief, and we restate them in reply, in case the court should care to correct these details of error.

(1) *The so-called non-interference period during the rebate prosecutions.*

The absence of red-ink entries during the winter months of 1906-07 was due to the absence of Java sugar (Brief, p. 126).

(2) *The Havemeyer letter.*

Mr. Heike did not know of the Havemeyer letter until March, 1910, and on the general matter of weights had, on the occasions prior to the date of said letter, called Mr. Havemeyer's attention to the differences between the settlement and refinery weights (Brief, p. 126).

(3) *That the secretary must have been aware of the frauds because of the differences between the custom-house and settlement weights.*

The secretary had nothing whatever to do with the company's custom-house department, and consequently paid no attention to custom-house weights (Brief, p. 117).

(4) *The claim that Heike sent Gerbracht to the Stranahan conference to prevent the discovery of the fraud is absurd.*

Mr. Heike's sole connection with this incident was the writing of a purely formal letter of introduction (Brief, p. 128 and p. 129).

(5) *The endorsement for deposit of the four Government checks for refund of duty.*

The liquidation and refunding of duties was exclusively controlled by the custom-house department of the company, with which Heike had no connection.

The four checks were endorsed by him solely because of the absence in Europe of the treasurer, Donner (Brief, p. 123 and p. 134).

(6) *The so-called Turner letter.*

The Turner letter was written to introduce in the Boston refinery the system of bookkeeping adopted in Brooklyn and Jersey City in 1900; that was its only purpose (Brief, pp. 134-6).

(7) *New system of bookkeeping not to conceal.*

The losses in weight were entered in red ink under the new method of bookkeeping to call attention to them (Brief, p. 126).

(8) *It would have been confusing to have had two sets of weights on the books of the refinery.*

The books at the refinery had nothing to do with the number of pounds of raw sugar for which the company had paid. It was the duty of the superintendents of the refineries to obtain the best possible results from the raw sugar actually received (Brief, p. 127).

(9) *The so-called Pink Books.*

These books were kept by the company's refinery employees—one set for tallying the custom-house weights and the other for tallying the city weighers' weight (fols. 538 and 541). These books were kept at the refineries and never taken to the Wall Street office (fols. 536 and 541).

(10) *Technical statements.*

The sole use which Mr. Heike and his clerks made of the technical statements was to obtain data for his monthly financial reports to the president and board of directors (fols. 3149, 3506, and 3613). See *Outlook* articles for description.

(11) *Heike was not the chief fiscal officer of company* (Brief, pp. 123-5).

(12) *Technical statements showed gains in crystallizable.*

The scientific part of these technical statements, that is, the percentage of crystallizable sugar, etc., did not concern Mr. Heike; that information was for the refinery department and those officials who had charge of the details of the process of refining (fol. 3155).

(13) *Destruction of technical statements.*

During the twelve years Mr. Heike received a copy of the technical statements from each refinery, he, as instructed,

annually caused his set to be destroyed; they were considered of a highly confidential character (fols. 3152, 3509, and 3613).

(14) *The so-called Montgomery Melting Books.*

By these books was put into effect the method of reducing refinery weights to the common basis of settlement weights. The red-ink entries were extended to non-dutiable as well as to dutiable sugars (Brief, p. 120, fol. 3214).

(15) *The red-ink additions of the loss in weight between settlement and refinery weights.*

These were calculated by Import Clerk Schmelter (Brief, p. 120).

(16) *The so-called Schmelter Tables.*

These tables were prepared annually by Import Clerk Schmelter, and contained statistics for the use of the raw-sugar department in buying sugar (Brief, p. 126, fols. 3176, 3470, 3488, and 3170).

(17) *Heike's sole connection with the technical departments of the company was as a bookkeeper or letter-writer.*

The technical information contained in Heike's letters was furnished to him by the proper departments. Such information as Heike needed concerning these special matters in conducting the correspondence of the company he would obtain directly from the appropriate departments (fols. 3157, 3197, 3199, and 3200).

(18) *The Havemeyers and Elder refinery was regularly showing a percentage of financial gain far less than the other refineries* (Brief, pp. 120-3).

As compared with the Jersey City refinery the Havemeyers and Elder refinery by its poor working lost annually $1,400,000.

(10) *We also criticise the following portions of respondent's brief on merits:*

Page 46, Gov. Brief, note.

Dividends were never paid on capital stock of *New York* Company, which was simply a holding company. Dividends were paid by *New Jersey* Company on its capital stock of $90,000,000—one-half common and one-half preferred stock.

Page 47, Gov. Brief. "The purchase weights and the duty weights."

There is absolutely no evidence in the case that Heike had anything to do with purchase of raw sugar nor with payment of bills for same. He had no occasion to compare purchase weights with duty weights (Brief, p. 117).

There is nothing significant in the fact that the two clerks who kept the purchase and duty weights "sat in the same room only three feet apart," except that it shows there was no attempt or desire to prevent a comparison of such weights.

Thompson, of the raw-sugar department, who had charge of receiving the shipping documents and paying the raw-sugar bills, testified he had noticed the differences between settlement and refinery weights; that he had, *unbeknown to Heike or Auditor Foster*, been making claims on shortages of raw sugar for more than ten years (fol. 1958).

Page 47, Gov. Brief. "The Schmelter Tables."

Schmelter was ledger clerk of raw sugar department (fol. 3842). In 1900-1904 he had been in the habit of making certain statistical tables for Havemeyer, showing the differences between settlement and refinery weights (fol. 3850). At suggestion of Heike, the differences between custom-house and refinery weights were added to these tables (fol. 3850). The tables were prepared for raw sugar department for use in making purchases of raw sugar (fol. 3851-2). The tables were not prepared for or by Heike, but solely for the raw sugar department (fols. 3452, 3459-62).

Page 48, Gov. Brief. "The refund checks," etc.

The invoice weights were not *"slightly"* excessive (pages 128, 130, 131, and 132).

There were only four refund checks endorsed by Heike, and because of absence of Donner, the Treasurer (p. 134).

Page 49, Gov. Brief. "The technical statements."

On invoice-weight cargoes no allowance was made by the shipper for "shrinkage"; the bills were paid upon weights as given in invoice as certified to at place of shipment, etc.

The invoice-weight cargoes *were reweighed* at refineries when the raw sugar was not melted at once, but stored for some time before being melted.

Page 51, Gov. Brief.

Heike's copies of technical statements were not destroyed *immediately after the verdict against the company for the frauds.*

This is an absolute and wilful misstatement of the facts. During the years that Heike had been receiving copies of these technical statements from all five refineries it was the custom to *annually* destroy the same. This matter is fully discussed in the brief in the Court of Appeals (pp. 38, 39, and 40).

The following is a description of what the technical statements contain:

Technical Statements.

Each refinery keeps a book or several books, in which are entered the daily operations of the refinery:—the quantity and grade of the raw sugar melted, and the quantity and grade of the refined sugar and syrup produced. At the end of every month the details of such operations are entered in a statement which shows:

1st. The raw sugar melted during the month, giving of each kind or grade of raw sugar, separately, the pounds melted, and their complete chemical analysis.

2nd. The refined sugar produced during the month, namely, the pounds of each kind or grade of sugar made, and their chemical analysis.

3rd. The syrup produced, namely, the pounds of syrup made, and their chemical analysis.

4th. The stock of "Sugar and Syrup in Process" at the end of the month, which means the unfinished product in the refinery that has ceased to be raw sugar and has not yet become refined sugar or refined syrup.

5th. The loss in refining, as represented by the percentages of crystallizable sugar, grape sugar, water, and the impurities.

The statement giving this information is called the "Technical Statement." A copy of it is sent by each refinery to Mr. Niese of the Refinery Department at 117 Wall Street, New York. This Refinery Department is the most important department of the company. Its members receive the largest salaries the company pays. Mr. Niese and Dr. Hooker each receive $50,000 annually. Mr. J. O. Donner, who died in 1900 or 1901, and whose name was mentioned at the trial, was a member of this department. He received an annual salary of $100,000.

As secretary of the company I had nothing to do with the operations of the refineries, and their technical statements, as such, were of no interest to me. But in the monthly financial statements which I prepared, and which have been explained above, I noted the percentages of hard sugar, soft sugar, and syrup produced by each refinery. These figures I formerly obtained from the technical statements which I borrowed from Mr. Niese for that purpose. The statements also gave to me (or to my clerks) the number of pounds of Crystal Domino sugar produced, which are used in calculating the advertising expense of that brand.

They also proved useful for the checking of the pounds of raw sugar melted as reported by the refinery to the raw-sugar clerk, and they gave the total of the refined sugar produced. As the borrowing of the statement from Mr. Niese was inconvenient (he might want to refer to it just when my clerks were using it), I arranged a number of years ago to have a separate copy of it sent to me. There were consequently three copies made at each refinery—one retained by the superintendent of the refinery, a second sent to the refinery department to Mr. Niese, and the third sent to the secretary's office, to me. Except as mentioned, I was not really entitled to the information contained in the statement (considered to be of a confidential nature, as an index of the efficiency of the refinery and the skill of its superintendent), and Mr. Niese asked me at the time to have my statements destroyed after I had finished with them.

Page 52, Gov. Brief.

Neither Gerbracht nor any one else ever sent reports to Heike, as set forth in the second paragraph on this page. The supervision of the refineries was not the business of the secretary, but of the refinery department of the company, of which Heike was not a member (pages 117, 118, 125, and 126 of the Brief).

Page 53, Gov. Brief. Heike did not correct technical statements.

Heike never corrected Gerbracht's technical statements, nor the statement of any other of the refineries, but added in red ink on his copy the excessive losses in weight as they appeared in red ink in the Montgomery melting books. This gave a convenient record of the total of the monthly meltings for reference in the secretary's office. The melting books were in Montgomery's office on another floor of the building (folk. 3502 and 3504).

Page 53, Gov. Brief. The Montgomery books.

The Montgomery books were not kept solely for Heike. The method as shown by the Montgomery books was outlined in the Turner letter and was extended to the other refineries (page 120 of the Brief).

Page 54, Gov. Brief. The Turner letter.

Already discussed in brief, pages 134 and 136.

The percentages of gains of crystallizable, as shown in this letter on page 55 of the Government brief, show what Heike considered "large gains."

Page 56, Gov. Brief. Non-interference period.

This point is made much of by the Government, and in my opinion it would be well to put in the reply brief substantially the same matter that is on pages 22, 23, 24, and 25 in the reply brief in the United States Circuit Court of Appeals.

There is no testimony in the case to the effect that Heike called Mr. Havemeyer's attention to the shortage on the same day he was haled in court in the rebate case. The testimony is that many times he called Havemeyer's attention to differences in weight, not particularly differences in custom-house weights, but differences between invoice and settlement weights.

Page 70 (Bottom of page), Gov. Brief.

This matter is answered in the *Outlook* article on pages 15 and 16, and in the case, pages 32, 35, and 36.

On the last page in the *Outlook* the writer speaks of another letter "on an unimportant subject," in the course of which Heike wrote, "as there are no duties paid on these sugars, there could, under no circumstances, be any harm in showing the weights, *as there could be no comparison with the Custom House Weights.*"

The subject, however, is not unimportant at all, and the letter should have been given in full. It is one of a number of letters written in 1897 in reference to Sandwich Island sugars shipped to New York. These sugars were consignments for which the company paid on landed weights and tests. Mr. Searles, who was the company's secretary at the time, requested me to take charge of the matter. I showed to our raw sugar clerks the method of rendering account sales, and I asked them to call my attention to anything extraordinary. The letter is as follows (fol. 4747):

SEPT. 24TH, 1897.

DEAR MR. GERBRACHT:

"The clerk of the insurance inspectors who went over to your refinery to see the weight books of the INDIANA came back with the report that the weight books had all been destroyed, and when he expressed surprise that they could not be seen by him, he was told that it would require a special annex to be built if we were to keep the weight books for inspection. As the INDIANA did not arrive until Sept. 13th, which was ten days ago, it seems, at best, that the annex would be very small to keep weight books for ten days; and as there were no duties paid on these sugars, there could under no circumstances be any harm in showing the weights, as there could be no comparison with Custom House weights.

"It is very unfortunate that so little attention is paid to the things required to collect insurance claims, and it is extremely difficult to get a settlement under the circumstances. The insurance inspector is always entitled to see the ship and you should not have allowed the INDIANA to go away until the man had been there to inspect her and see the cause of the damage. It is true that you sent word at once to the office, but it seems that the young man had gone on his vacation and the one in charge of his work had not been properly instructed, but under the circumstances you might have sent even a second or third request for the inspector to come over, or you could have telephoned me to send him. It is particularly necessary with these Sandwich Island cargoes, because there is always a considerable part damaged by

what we call 'sweat-damage,' so that the mere presence of damaged bags on the dock does not show that the underwriter is liable for them.

"I may say that I was well aware that an attempt had been made to scuttle the ship at Hilo, but the captain particularly stated in his letter sent from that port that the sugar was not damaged, as the water did not reach up to the dunnage, and the protest which he filed here in New York to account for the damage stated that it was due to extremely rough weather on the passage to New York, and that the water got in through the hatches and along the masts. It was to verify these statements that the insurance man ought to have seen the ship. They asked me to see the weight book because they thought some of the drafts might have been lighter than others, which would indicate that some of the bags were empty or slack and washed out, which is always a good evidence of salt-water damage.

Yours truly, C. R. HEIKE."

It will be seen that the letter is in reference to an insurance claim. Shipments had been insured against loss in weight and damage to the sugar. In the letter I took Mr. Gerbracht to task for not having preserved the weight books for examination by the Insurance Inspector. The claims for loss in weight are based upon the differences between the invoice weight, as shipped from Honolulu, and the landed weight, as taken at the refinery. *The smaller the landed weight, the larger the loss and the claim.* In order to be able to check the refinery weights, on which the claim is based, the insurance people always like to get, if possible, another set of weights, taken by another weigher. If the second weights are lighter than the refinery weights, there is a prompt settlement of the claim; but if they are heavier, there will probably be a dispute.

On sugar subject to import duty there is always a second weight, namely, the Custom House weight. Now, if the Custom House weights were the same as the refinery weights, or even lighter, there would be no trouble with the settlement; but if the Custom House weights were heavier than

the refinery weights—if it appeared that duty was paid on a larger number of pounds than the refinery weights showed as having been received—the Insurance Company would very likely dispute the claim.

As Sandwich Island sugars pay no duty, there could be no custom-house weights for comparison, and that is what I stated to Mr. Gerbracht. I have no idea at present why I should have written this thirteen years ago, but it clearly establishes the fact that I held that *custom-house weights were or might be heavier than refinery weights*. Perhaps at a previous time Mr. Gerbracht had made a claim on a cargo of dutiable sugar, and he had found difficulty in collecting it on account of the heavier custom-house weights.

The remainder of the letter is very interesting, for it shows how careful I was that no unjustified claim should be made.

The damage to raw sugar on a voyage is of two kinds (fol. 3216): "Sweat Damage," caused by deterioration of the quality due to the long voyage in hot climates (the shipments from Honolulu cross the equator twice); and, secondly, "Marine-Damage," caused by salt water. The insurance company is only liable for "Marine-Damage"; but after the discharging of a cargo and the placing of the damaged bags on the dock it is practically impossible to ascertain to which of the two causes the damage is due.

As a rule people are not very particular in the rendering of claims against insurance companies, and I may say that one who is as conscientious as the writer of this letter is not likely to be a party to a scheme to defraud the Government, as has been alleged. The letter was certainly not written for effect. Who could have imagined at the time that it would be read at a trial in court thirteen years later!

3. *In reply to respondent's brief, fourth point, and in support of petitioner's brief, point X. Testimony of acts and declarations of persons other than the petitioner prior to the formation of the conspiracy.*

Government counsel fail entirely to answer the tenth point in petitioner's brief, that error was committed in the admission of testimony as to acts and declarations of co-conspirators and strangers to the conspiracy prior to its formation.

Government counsel seek to avoid this error by claiming that there was a conspiracy other than the one alleged in the indictment, and that in any event the admission of the testimony was in the discretion of the trial court.

The indictment charges that the defendants conspired together on March 1, 1907 (Record, 19, 27). *The conspiracy laid in the indictment is the only conspiracy of which the petitioner was apprised and the only one he was called upon to meet.*

The claim that the admission of this class of testimony rested in the discretion of the trial court is founded on an entire misunderstanding of the nature of the testimony. That the acts and declarations testified to were not acts and declarations of the petitioner has been entirely overlooked or intentionally ignored.

This court in Logan *vs.* United States and in Brown *vs.* United States, cited in our brief, has laid down the rule that *only those acts or declarations of a conspirator, done or made while the conspiracy is pending* (the conspiracy laid in the indictment), can be admitted in evidence against the party charged. And other courts have followed this rule. If the admission of testimony of acts or declarations of a co-conspirator or stranger to the conspiracy, not done or made pending the conspiracy, rests in the discretion of the trial court, then this court has not made a binding rule of evidence, but only expressed an opinion.

It is true that other similar fraudulent acts and doings of a party may be admitted against him upon the question of intent, but they must be *his* acts and doings and not the acts and doings of others. This is the rule laid down in all the cases cited in the Government brief in support of the contention that the admission of the testimony mentioned rested in the discretion of the trial court. In all of the cases cited by the Government the acts committed or declarations made were the acts or declarations of a party to the conspiracy. In the case at bar the testimony admitted was as to transactions and conversations long prior to the conspiracy with persons other than the petitioner.

No case is cited by the Government which justifies in a case of conspiracy the admission in evidence of any acts or declarations, unless they were the acts or declarations of the co-conspirator, done or made while the conspiracy was pending, or the acts or declarations of the party charged. Here, the acts and declarations were not the acts and declarations of the party charged, nor were they the acts or declarations of a co-conspirator pending the conspiracy. Upon no legal ground was this testimony admissible, nor was its admissibility in the discretion of the trial court. Irrespective of any other point, the error in admitting this testimony of acts and declarations of persons other than the party charged, ranging over a period of thirteen years prior to the formation of the conspiracy, demands the reversal of the judgment.

JOHN B. STANCHFIELD,
Counsel for Petitioner.

TABLE OF CONTENTS.

	Page.
Comment on petitioner's brief	2
Statement of the case	2
The questions involved	6

FIRST POINT.

The plea of immunity was not well founded	7
First. The statute does not grant immunity for evidence that would not have been privileged	8
I. The authorities	10
II. The immunity statutes are in derogation of essential governmental powers and are not to be extended by construction	17
III. The immunity is solely an exchange for the constitutional privilege	19
IV. No public policy calls for the construction contended for	26
Second. None of Heike's evidence was privileged	27
1. His name and identity	31
2. His position as secretary and treasurer	32
3. The Kissel checks	32
4. The incorporation of the company and its property	34
5. Exhibit 18	35
The facts of the crime	43
The scales and springs	43
The Pink Book tables	44
"Spitzer's gang"	45
Heike's connection with the crime	46
Purchase weights and duty weights	47
Schmelter tables	47
Refund checks	48
Technical statements	49
Landed weight cargoes	49
Invoice weight cargoes	49
Heike's correction of the technical statements	53
The Montgomery books and the red ink additions	53
The Turner letter	54
The Havemeyer letter and the "noninterference period"	56
Reappearance of the fraud	58
The final discovery	58
Heike's defense	58
Special Trial Exhibit 18 entirely irrelevant	59
Third. The immunity statutes do not grant immunity excepting for offenses under the acts to which they refer	61

SECOND POINT.

Page.
The direction of a verdict on the special plea in bar was proper.... 61

THIRD POINT.

The admission of the so-called Pink Books was not error..... 62
First. An unnecessarily complete foundation was laid for these books..... 62
Second. It would have sufficed under the circumstances to prove the routine..... 69

FOURTH POINT.

Spitzer's testimony concerning the early history of the conspiracy was properly admitted..... 70

INDEX OF CASES.

American Lithographic Co. *v.* Werckmeister, 221 U. S., 603..... 18, 22
Armour, U. S. *v.*, 142 Fed., 808..... 18, 25
Bacon *v.* U. S., 97 Fed., 35..... 69
B. & O. *v.* I. C. C., 221 U. S., 622..... 8, 40
Beuttell *v.* Magone, 157 U. S., 154..... 62
Bottomley *v.* U. S., 1 Story, 135..... 71
Boyes, Queen *v.*, 1 B. & S., 311..... 28
Brown *v.* Walker, 161 U. S., 591..... 11, 20, 22, 28, 61, 73
Burr, U. S. *v.*, 25 Fed. Cas., 39..... 18, 28, 42
Charles River Bridge *v.* Warren Bridge, 11 Pet., 420, 543..... 17
Chicago Lumbering Co. *v.* Hewitt, 64 Fed., 314..... 63
Continental Bank *v.* Nat. Bank, 108 Tenn., 374..... 70
Counselman *v.* Hitchcock, 142 U. S., 547..... 21, 72
Daly, Com. *v.*, 4 Gray (Mass.), 209..... 62
Dreier *v.* U. S., 221 U. S., 394..... 8, 40
Ellsworth, State *v.*, 131 N. C., 773..... 62
Foote *v.* Buchanan, 113 Fed., 156..... 24
Fox, U. S. *v.*, 95 U. S., 670..... 17
Greene *v.* U. S., 154 Fed., 401..... 69
Greenleaf on Evidence, vol. 3, sec. 93..... 71
Grossberg *v.* U. S., 145 Fed., 81..... 69
Hale *v.* Henkel, 201 U. S., 43, 69..... 10, 18, 24, 75
Hayden *v.* Williams, 96 Fed., 279..... 39
Heike *v.* U. S., 217 U. S., 423..... 6
Hickory *v.* U. S., 151 U. S., 303..... 33
Holt *v.* U. S., 218 U. S., 245..... 32
Irvine, ex parte, 74 Fed., 960..... 29, 31, 42, 43
Jack *v.* Kansas, 199 U. S., 372..... 22
Kamch *v.* U. S., 171 Fed., 366..... 69
Kimball, U. S. *v.*, 117 Fed., 156..... 15, 26
Kissel, U. S. *v.*, 218 U. S., [illegible]..... 2, 70
Kittle, Re, 180 Fed., 946..... 15, 18

	Page.
Logan v. U. S., 144 U. S., 263, 283	17
Louisville Ry. v. Kentucky, 161 U. S., 677, 685	17, 18
Miss. Logging Co. v. Robson, 69 Fed., 773	69
Morse v. U. S., 174 Fed., 539	70
Murphy, State v., 128 Wisc., 201	13, 17, 27, 62
Noblom, U. S. v. 27 Fed. Cas., 185	59
Price, U. S. v., 163 Fed., 904	32
Rudolph v. State, 128 Wisc., 226	62
Standard Oil v. U. S., 221 U. S., 1	70, 71
Swift, U. S. v. 186 Fed., 1002	11, 20
Thirty-six Barrels, U. S., v. 7 Blatchf., 469	71
Walker, State, v., 98 Mo., 95	71
Warner, State, v., 13 Iowa, 52	15
Wigmore on Evidence:	
Sections 1521, 1530	70
Section 2281a	12
Section 2192	18
Wilson v. U. S., 221 U. S., 361	8, 39, 41
Wood v. U. S., 16 Pet., 342	71

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

CHARLES R. HEIKE, PETITIONER,
v.
UNITED STATES OF AMERICA,
respondent.
} No. 520.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The Government refers especially to the brief filed by Mr. Solicitor General Lehmann in opposition to the petition for certiorari herein. In that brief Mr. Lehmann incorporated by reference, as to some points, his brief in opposition to the petition of the codefendant, Ernest W. Gerbracht, for certiorari (No. 937, October Term, 1911), and we therefore refer also to that brief.

The opinion of the trial court on the special trial of the immunity plea is reported at 175 Federal Reporter, 852, and appears in the record at page 266.

The charge of the trial court on the trial of the plea of not guilty appears at pages 1329–1344 of the record.

The opinion of the Circuit Court of Appeals affirming the judgment is at page 1641 of the record and is reported in 192 Federal Reporter, 83.

The statutes concerned are printed in an appendix.

COMMENT ON PETITIONER'S BRIEF.

We regret the length of our brief, but the statements made in petitioner's brief as to the position of the two courts below and as to the position of the Government and as to the vital facts upon which each of the essential points in the case turns are incorrect and misleading; and we are therefore driven to the necessity of making a more detailed analysis of the facts under the points than should be necessary in this court.

Particularly the statements, scattered throughout the petitioner's brief, that Heike's evidence was in fact the clue by which the sugar-weighing frauds were discovered and a basis of the prosecution against him (Brief, pp. 75, 73, 76, 102, 66, 77, 104, 115, 150) are false in fact and have not the slightest basis in or out of the record, as we shall show hereafter.

STATEMENT OF THE CASE.

On January 14, 1910, the petitioner, Charles R. Heike, together with others, was indicted for violations of the customs laws in connection with the fraudulent importation of dutiable sugar (R. S., sec. 5445, and sec. 9, customs administrative act), and for conspiracy, under section 5440, to commit such offenses and to defraud the United States of its revenue. (Indictment, folios 13–84, pp. 5–28.)

On January 24, 1910, Heike filed a special plea in bar claiming immunity from prosecution under this indictment by reason of his attendance as a witness and production of documents in the following pro-

ceedings theretofore had before grand juries, all arising under the act commonly known as the Sherman Antitrust Law (26 Stat., 209) and concerning alleged violations thereof (Plea in Bar, folios 103–126; additional Plea in Bar, 5 Fed. 9, folio 161, p. 54):

1. An inquiry pending in June, 1909, into an alleged violation of the Sherman law by reason of the acquisition on the part of the American Sugar Refining Co. of the Pennsylvania Sugar Refining Co. of Philadelphia arising out of the so-called Kissel loan of December 30, 1903 (folios 380–386). This court has had that transaction before it in another litigation, and is familiar with the subject matter. (*U. S.* v. *Kissel*, 218 U. S. 601.) Heike unquestionably knew that the subject matter of the investigation before this grand jury was this Segal-Pennsylvania Refinery transaction (folios 380, 384, 525). The subpœnas duces tecum, in response to which Heike appeared, were limited to the papers referring to that transaction (folio 386; Deft.'s Exhibit 2, p. 289; Deft.'s Exhibit 6, p. 290).

2. An inquiry pending in December, 1909–January, 1910, into the question whether or not the sugar company had been guilty of monopolizing or restraining trade in violation of the Sherman law. Heike was informed by his counsel that such was the limited scope and purpose of this inquiry; and he learned of it still more, without any possibility of doubt, from the course of his own examination before the grand jury (folios 393, 402, 404 et seq.).

Heike's appearance in each of these proceedings was in response to subpœnas duces tecum which were

addressed to him in his capacity as secretary of the corporations concerned, and which called exclusively for corporate records. (Special Trial Exhibits 2 and 6, pp. 289, 290; Special Trial Exhibit 16, p. 314.) Heike himself called attention to the fact that he was summoned in his representative capacity (folio 291).

The claim of immunity is based upon the following particular items of evidence given or produced by Heike in those proceedings:

(*a*) That he was secretary of the American Sugar Refining Co. and secretary and treasurer of the American Sugar Refining Co. of New York (folios 262, 275, 489).

(*b*) That he produced four checks of the American Sugar Refining Co. which represented the Segal loan and which were in fact signed by him (folios 283, et seq.).

(*c*) That the American Sugar Refining Co. of New York was a corporation and that it owned, among other things, the Havemeyer and Elder refinery (folios 293–303, 404–409).

(*d*) A tabulation (made not by Heike but by clerks of the corporation from the books of the corporation) showing the aggregate annual sugar meltings at the various refineries of the American Sugar Refining Co. (including the Havemeyer and Elder refinery) for each year from 1887 to 1908. (Special Trial Exhibit 18, p. 317.)

On February 1, 1910, the United States filed a replication traversing this plea, setting forth in substance the following:

1. The prosecution herein relates exclusively to customs frauds.

2. The proceedings in which Heike testified and produced documents were entirely distinct and independent, were conducted by different counsel, and were in no possible way connected with the prosecution of the indictment herein.

3. As to none of the transactions, matters, or things on account of which this prosecution was brought against the petitioner did Heike testify or produce documents in the above proceedings, nor could the documents which he produced or the testimony which he so gave form part of the transaction which is the subject of this indictment (folios 142–154, pp. 48–52).

By the filing of a joinder to the Government's replication, the issue was joined by the petitioner (folios 155–158). The petitioner thereby insisted upon a separation of the issues and a separate trial before a separate jury upon the plea in bar. The issues thus raised were brought to trial before a jury on February 10, 1910. At the conclusion of the testimony, the petitioner and the Government each moved for a direction of the verdict (folios 633, 637). After lengthy arguments (fols. 639, 676), Judge Martin granted the Government's motion (folio 815). At no time did the petitioner ask to go to the jury (folios 633, 637, 815).

Upon application by Heike, he was granted the privilege of pleading over, and he thereupon entered a plea of not guilty and the case was set for trial on March 1, 1910 (folios 818, 825). A writ of error to review the judgment upon the plea of immunity was allowed by one of the justices of this court, but

was subsequently dismissed on the ground that the judgment overruling the plea of immunity, where the privilege of pleading over had been accorded to the petitioner, could be brought up for review only after the final disposition of the case on the merits. (*Heike* v. *United States*, 217 U. S., 423.)

The case thereupon proceeded to trial upon the indictment, before a new jury, resulting in the conviction of the petitioner on one of the conspiracy counts (the sixth count). After the verdict upon the general issue, the petitioner again raised the claim of immunity upon his motion in arrest of judgment (folio 4113).

A writ of error was taken to the Circuit Court of Appeals, which affirmed the judgment (folio 1641, 192 Fed. Rep., 83), and the case comes here on certiorari.

The facts, as to the crime itself and as to Heike's connection with it are, of course, covered by the verdict, but we have nevertheless found ourselves obliged to outline them *infra* in connection with the question whether certain of the alleged immunizing evidence produced by Heike was in fact incriminating.

THE QUESTIONS INVOLVED.

The propositions discussed in this brief are the following:

First. Heike's plea of immunity was not well founded for the following reasons:

(*a*) The immunity statutes are merely substitutes for the constitutional privilege and do not grant immunity gratuitously for evidence which never could have been withheld in any event.

(*b*) None of his testimony was self-incriminating or could have been withheld under any plea of constitutional privilege, even irrespective of any immunity statute. None of it "concerned" the weighing frauds which were the subject of this prosecution. None of it was incriminating and the portions of it most relied on by petitioner were corporate documents produced by him as a mere messenger on behalf of the corporation.

(*c*) The immunity statutes do not grant immunity excepting for offenses under the acts to which they refer. As to evidence tending to incriminate a witness of other offenses entirely unrelated to such acts, he still retains the constitutional privilege.

Second. The direction of a verdict on the special trial of the plea in bar was proper.

Third. The admission of the so-called "Pink Books" on the main trial was not error.

Fourth. The admission on the main trial of the testimony of Spitzer concerning the early history of the conspiracy was not error.

FIRST POINT.

THE PLEA OF IMMUNITY WAS NOT WELL FOUNDED.

The successive immunity statutes are set forth in full in the appendix to this brief.

The paraphrases and interpretations given by petitioner's brief of the opinions of the Court of Appeals on this question (Brief, pp. 21, 91, 56, 57, 76, 27, 108, 97, 150, 52, 77, 92), and of the trial court

(Brief, pp. 55, 35, 27, 104, 29), seem to us unfair, and we therefore beg to refer the court particularly to the text of those opinions (pp. 266, 1641) without attempting any paraphrase ourselves.

The reasoning of both opinions seems to us entirely sound and consistent. As to Judge Martin's views, stated on the special trial, it should be observed that they were announced prior to the decisions of this court in *Wilson* v. *U. S.* (221 U. S., 361); *B. & O.* v. *I. C. C.* (221 U. S., 622); and *Dreier* v. *U. S.* (221 U. S., 394). Nevertheless, Judge Martin recognized the fundamental and vital distinction between any personal testimony of Heike on the one hand, and on the other his production of corporate books and papers produced by him as a mere messenger for the corporation. The effect of this distinction was formulated by Judge Martin in a somewhat different fashion from that in which it was formulated by the Court of Appeals in the light of the *Wilson* and other cases above cited, but in substance the reasoning of the two courts was the same.

First. The immunity statute, being legislation in derogation of the sovereign powers to punish for crime and to elicit the truth in the administration of justice, is not to be extended by construction beyond the purpose for which it was enacted, namely, to serve as a substitute for the constitutional privilege against self-incrimination. It therefore does not make gratuitous grants of immunity merely because of testimony which never was privileged and which, irrespective of any immunity statute, never could have been withheld.

Our position is that the amnesty does not flow excepting in exchange for the constitutional privilege of silence. Heike never could have refused any of the items of evidence upon which he here relies. None of it tended to incriminate him, and most of it also consisted merely of corporate documents produced by him as a messenger of the corporation, and would not have been privileged at all even if it had been incriminating.

We are in some doubt whether the petitioner's brief really takes issue with this construction of the statute. It does not seem to argue that Heike would have obtained immunity by merely testifying to *anything*, however disconnected with crime. Indeed the brief states explicitly "that the bar is limited by statute to such offenses only as are concerned in, *that is, discovered or led up to by, the testimony.*" (Brief, p. 24.) And again at page 104 they say that "the sole condition is that the testimony he gave 'concerned' the offense discovered in some degree—he need not testify about the offense directly—it is enough if he furnish a 'link' of evidence or a 'clue' to the discovery, or neither, if one concern the other in any way—and then the amplest possible amnesty protects him from prosecution." And again at page 74, "it is not pretended that giving evidence will pardon every offense the witness may have committed, but only those *'concerning'* which he testified."

In our view these concessions dispose of the case because, as we shall show, nothing in Heikes' testimony tended to incriminate him or furnished or

could have furnished the slightest "link" or "clue" to the sugar-weighing frauds.

However, for the purpose of the argument, notwithstanding these apparent concessions and the whole policy of the petitioner's brief, we assume that counsel's position is that even innocent *nonincriminating* testimony gives immunity, at least if it is testimony which might be admissible on the trial of the crime. On the facts this is the only question really raised. Heike's identity, his official position, the incorporation of the American Sugar Refining Co., and the special trial exhibit 18, were all facts which might have been relevant in a trial for the sugar-weighing frauds, but none of them were incriminative.

Do such facts "concern" the crime of conspiracy to defraud the United States of its customs within the meaning of the immunity statute?

So to extend these statutes by construction is to disregard their character, the purposes of their enactment, and the plain implications of their history; and it is contrary to the best considered authority which has thus far expressed itself on the question.

I. The authority thus far existing on the direct question.

The question was touched on in *Hale* v. *Henkel* (201 U. S., 43, 69), where the court held that the immunity statute was not "designed" to protect corporations, and gave as a reason the fact that the constitutional privilege did not extend to corporations. The identity in scope between the immunity and the privilege was assumed as a matter of course.

In *Brown* v. *Walker* (161 U. S., 591) the point was not involved, but throughout the opinion it was considered that the immunity was an exchange for the privilege, and that the testimony which gave it was testimony which tended to incriminate and would otherwise be privileged. It was nowhere suggested that *every* piece of testimony, however innocent, resulted in immunity.

In *United States* v. *Swift* (186 F. R., 1002), in the District Court for the Northern District of Illinois, Judge Carpenter squarely held that the immunity act is to be construed as we here contend. His opinion is exhaustive and well reasoned. Its essence is stated as follows:

> Defendants must rest squarely upon the proposition that the immunity granted by the statute is broader than the privilege of the Constitution. However, both the Constitution and the immunity statute apply only to incriminatory evidence; the former by construction given by the Supreme Court of the United States, and the latter by its very terms.

Judge Humphrey's prior decision in the same district in *United States* v. *Armour* (142 F. R., 808) expresses views (not necessary to the decision) which are contrary. In that case the evidence laid before the Commissioner of Corporations was of an incriminatory character, the production of which was not compellable in the absence of an immunity statute. The defense there could have asserted the

privilege. Furthermore the immunity statute before Judge Humphrey related to the Bureau of Corporations, and he may well have been correct in his holding that the primary object of *that* statute (act of Feb. 14, 1903, c. 552, 32 Stat. 825, 828) was to aid the bureau in its administrative purposes of gathering information for legislative and executive purposes. Certainly the purpose of the immunity provisions relating to the Interstate Commerce and the Sherman laws, to be utilized by the Department of Justice, were intended to aid the enforcement of those laws, and especially the prosecution of their criminal provisions.

Judge Humphrey's opinion is analyzed and convincingly answered by Wigmore on Evidence, who summarizes his views in the following passage:

> The reason is that the anticipatory legislative pardon or immunity is not given absolutely, but only conditionally upon and in exchange for the deprivation of the privilege. The legislature did not intend to give something for nothing; *i. e.*, to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness's failure to insist on his privilege. The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicity presented, and thus needed to be overcome. (5 Wigmore on Evidence, sec. 2281a, pp. 240, 241.)

Judge Humphrey's views were also analyzed and answered by Judge Marshall in *State* v. *Murphy* (128 Wis., 201), in passing upon this question under a Wisconsin immunity statute modeled upon and in the same form as the Federal immunity statute now before this court.

Judge Marshall's discussion is as follows:

> The exposition of the Federal statute by Justice Humphrey in the *Packers'* case, quoted from by my brother Dodge, viewed as applicable to statutes of which ours is a type, I believe goes altogether too far and will not stand the test which will be applied to it. * * *
>
> (2) The statute is not broader than the constitutional guaranty for which it was intended to be a "substitute." The very idea of a substitute suggests the limitation of one as that of the other. In other words, that they are equivalent, one being exchanged, by force of law, for the other.
>
> (3) The statute does not immune because of evidence given other than that of a self-incriminatory character; such as without the statute would be obscured by the constitutional privilege of silence. * * *
>
> (5) In the term "no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence," etc., the term "transaction, matter, or thing" has reference to any of the designations; to an event of a criminal character. Each is one of a species, a synonym, in great

part, for either of the others. The familiar rule of noscitur a sociis applies. The evidence spoken of is evidence of an incriminatory character as to a transaction giving rise to a cause of action to punish for a crime, or a thing giving rise to such cause, or a matter giving rise to some such cause, in which the witness participated. It has no reference to any remote circumstances not in itself a basis for such a cause. In other words, the law contemplates only a situation as regards an event, whether denominated a transaction, a matter, or a thing, where, under the constitutional privilege of silence, the person compulsorily called to testify might refuse to speak, but for removal of the precise danger which such privilege was designed to shield him from. So the statute becomes active whenever and wherever the constitutional privilege would otherwise operate, and its activity ceases when they would otherwise not intervene. It is a substitute, and that only. (128 Wis., pp. 219–220.) * * *

The need of vigorous investigation and punishment of offenders of the law is at least as apparent to-day as it ever was, and it is equally apparent that Congress has intended to clothe the Department of Justice with full power to enforce the mandates of the law, and to cover the guilty with the mantle of immunity only when essential to ascertain material facts. Immunity, or the constitutional privilege for which it is intended as a substitute, should not be enjoyed beyond a reasonable protection. (Judge Martin's opinion, folios 812–813.)

> The purpose of the immunity statute was to take the place of the constitutional privilege against self-incriminatory evidence. It was designed to open the doors in just so far as such privilege would otherwise hold them closed by the right of silence. Its scope, therefore, coincides with such privilege, stopping not short of it nor going beyond it. . . . The statute is not broader than the constitutional guaranty for which it was intended to be a "substitute." The very idea of substitute suggests the limitation of one as that of the other. In other words, they are equivalents, one being exchanged, by force of the law, for the other.
>
> Marshall, J., in *State* v. *Murphy*, 128 Wis., 201, 218, 219, 220.
>
> See also *State* v. *Warner*, 13 Lea (Tenn.), 52, 62–64.

Our construction of the immunity statute is also supported by the fundamental reasoning of Judge Hand's opinion in *Re Kittle*, 180 F. R. 946, p. 948 (So. Dist. N. Y.), and by the opinion of Judge Thomas, sitting in the Circuit Court for the Southern District of New York in *United States* v. *Kimball* (117 Fed., 156, 163, 166, 168). Judge Thomas held that mere testimony in obedience to a subpœna does not amount to the necessary compulsion and he stated his view of the purpose and construction of the immunity statute as follows:

> The immunity statute was passed to obviate the difficulty of obtaining testimony in criminal cases caused by the constitutional

guaranty that no person should be compelled to be a witness against himself. This provision as construed means that no person should be compelled to answer questions concerning any matter when the court can see that his answers might reasonably have a tendency to convict him of crime. The immunity statute declares in substance that he shall be compelled to answer such questions, but shall never be prosecuted on account of the matter concerning which he may so testify. In my judgment the immunity statute is as broad as the privilege which it was passed to obviate, and no broader. In order to gain the immunity the witness must, in my opinion, be compelled to testify. He could waive his constitutional privilege by testifying voluntarily; he can likewise waive his statutory immunity by doing the same thing. I do not think that compelling a person to appear by subpœna can properly be considered as compelling him to testify. It was not so considered with regard to the constitutional guaranty. A person might be compelled by subpœna to attend, but might testify voluntarily when so in attendance, and thus waive his privilege. In like manner I think he may waive his immunity. Otherwise the statute becomes a snare to the prosecutor and a means of avoiding the just consequences of crime. I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command

of the law and the court. When this has been done he gains immunity from prosecution on account of the transaction or matter concerning which he testifies and not before. See also Winslow, J., in *State* v. *Murphy*, 128 Wis., 201, 221.

II.—The immunity provisions are statutes in derogation of essential governmental powers, and as such should not be extended beyond the purpose of their enactment.

The right to punish for the commission of crime is one of the most important functions of government. Although the Constitution contains no specific grant to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting (Art. I, sec. 8), it is of course well settled that the power of Congress to provide for the punishment of all crimes and offenses against the United States is one of the implied powers under the Constitution. (*United States* v. *Fox*, 95 U. S., 670; *Logan* v. *United States*, 144 U. S., 263, 283.)

Obviously, a statute of immunity is a suspension of this governmental power to punish. An immunity is a governmental grant. And by well-settled principles, no suspension of a governmental power is to be implied beyond the reasonable intendment of the statute, and governmental grants are not to be extended by implication against the Government. (Cf. *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420, 543–554; *Louisville Railway* v. *Kentucky*, 161

U. S., 677, 685. See also, as to this grant of immunity, *Re Kittle*, 180 F. R. 946, p. 948, *supra*.)

There is involved, in the proper construction of the immunity statute, another sovereign right of perhaps even greater importance—the right which "entitles the United States to the testimony of every citizen," a right which lies at the very foundation of the administration of justice. (Marshall, C. J., in *United States* v. *Burr*, 25 Fed. Cas., pp. 39–40; *Hale* v. *Henkel*, 201 U. S., 43, 73; *American Lithographic Company* v. *Werckmeister*, 221 U. S., 603; *Wigmore on Evidence*, sec. 2192.) The only limitation upon this duty resting upon every man freely to give testimony is the old common-law exemption "by which every witness is privileged not to accuse himself," embedded in the fifth amendment of the Constitution. (Marshall, C. J., in *United States* v. *Burr*, 25 Fed. Cas., pp. 39–40, *supra*.)

To avoid this exemption by affording a substitute for it was the purpose of the immunity statute; and in the limitations of the exemption which has given rise to the statute we find the clues to its correct interpretation.

For, in so far as a claim of immunity is sustained which extends beyond the scope of the privilege against self-crimination which the immunity sought to supplant, there is involved necessarily a gratuitous suspension of the governmental powers to punish for crime and of the Government's right to enact freely the testimony of every man.

III. The purpose of the immunity statutes, as shown by their structure and their historical evolution, was to prevent the obstruction of the specified prosecutions by the exercise of the constitutional privilege. This purpose was accomplished by an exchange of immunity for the privilege. There is nothing either in the terms of the act or its history to indicate any intention of granting a bonus in addition to this exchange.

The act directly concerned is the appropriation act of February 25, 1903. (Appendix.) This act, however, must be read in connection with the act of February 11, 1893 (appendix), with which it is in pari materia and which in effect it merely extends so as to cover proceedings under the Sherman anti-trust law. The history of these provisions, as well as of the others and their interrelation, are fully set forth in our discussion *infra* of the history of this legislation.

The form of the act of February 11, 1893, is a balance indicating an exchange. It says:

> *No person shall be excused* from attending and testifying or from producing books * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture. *But* no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise * * *."

The clause beginning "But" is in relation to and a plain exchange for the clause which withdraws the "excuse" from testifying on the ground of incrimination.

Also the word "concerning" indicates a real connection with a crime analogous to the connection which would raise the right to privilege.

The theory of petitioner's brief is that the purpose of Congress was to "encourage volunteer witnesses" and to "persuade" them to testify, by giving them "a reward" of absolution from all crimes. (Br., pp. 54, 32, 41, 30, 71, 78, 97.)

This interpretation has nothing whatever to base itself on. It was repudiated by Judge Carpenter in the *Swift* case (186 F. R., p. 1016), *supra*, and by *Wigmore* in the passage quoted, supra.

The history of the subject shows perfectly plainly that what Congress was seeking to accomplish was the removal of the obstacle of the privilege. There is nothing whatever to indicate that Congress conceived of any necessity to offer rewards for testimony which the process of the courts could obtain in the ordinary course. The purpose was to *compel* disclosures which could otherwise have been lawfully withheld. The point was stated in *Brown* v. *Walker*, 161 U. S., at p. 610, as follows:

> If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous acts,

> wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer, and that the judgment of the court below must be affirmed.

Congress has been exceedingly conservative in the enactment of statutes granting immunity. Instead of passing a general immunity statute, it has gone step by step, granting no greater immunity than was necessary for the enforcement of the various commerce laws.

Section 860 of the Revised Statutes was first passed, which provided, in a word, that no evidence obtained from a witness shall subsequently be used against him in a criminal proceeding. (See text, Appendix.) But in *Counselman* v. *Hitchcock* (142 U. S., 547) the Supreme Court held that this section was inadequate as a substitute for the constitutional privilege against self-crimination, because it was not coextensive with the privilege. The gist of the holding was as follows:

> Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a

> full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offense to which the question relates.* (142 U. S., 547, 586.)

In consequence of the decision in the *Counselman* case the act of February 11, 1893 (27 Stat., 443; see text, appendix), was passed (see *Jack* v. *Kansas*, 199 U. S., 372, and *American Lithographic Co.* v. *Werckmeister*, 221 U. S., 603, 611), applicable solely to proceedings under the interstate-commerce law, for the more effective enforcement of the criminal provisions of that law. The constitutionality of this act came before the Supreme Court in *Brown* v. *Walker* (161 U. S., 591). In the course of his opinion Mr. Justice Brown said:

> The inference from this language [of the *Counselman* case above quoted] is that if the statute does afford such immunity against future prosecution, the witness will be compellable to testify. So also in *Emery's* case (107 Mass., 172, 185) and in *Cullen* v. *Commonwealth* (24 Gratt., 624), upon which much reliance was placed in *Counselman* v. *Hitchcock*, it was intimated that a witness might be required to forego an appeal to the protection of the fundamental law if he were first secured from future liability and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. To meet this construc-

tion of the constitutional provision, *the act in question was passed exempting the witness from any prosecution on account of any transaction to which he may testify* (161 U. S., pp. 594–5; italics ours).

And the court concluded, after a thorough examination, that the act in question did sufficiently satisfy the constitutional guaranty of protection so as to compel the disclosure of incriminating testimony. It seems perfectly clear that, in the opinion of the court, Congress merely supplied the necessary requirement demanded by the decision in the *Counselman* case.

In the latter case the Supreme Court said Congress did not give enough. Congress thereupon passed the act of February 11, 1893, to give enough and not to give too much. It did not, as the defendant here would have it, give an uncalled-for bonus or gratuity for the securing of testimony which was never protected by the constitutional privilege and could, therefore, be obtained as of course. For the more adequate enforcement of the interstate-commerce laws it became necessary to compel the giving of testimony, the disclosure of which could otherwise be obstructed by claim of the constitutional privilege. It is not rational to assume that Congress intended to defeat its very purpose of more effectively administering those laws by gratuitously immunizing persons for the mere sake of immunising them without the compensating advantage of securing incriminatory testimony otherwise unattainable.

In *Foote* v. *Buchanan* (113 Fed., 156) it was held, in 1902, that the act of February 11, 1893, is confined to a specific class of cases, i. e., cases growing out of alleged violations of the interstate-commerce act, and does not afford immunity, with the resulting right to compel a disclosure of incriminating evidence, in cases arising under the Sherman law. Congress therefore proceeded, in a proviso to the general appropriation act of February 25, 1903 (32 Stat., 854, 904; see appendix), to extend immunity from prosecution to cases arising under the Sherman law. This proviso is an act in pari materia with the immunity provision of the act of February 11, 1903, and the two were drawn together by Congress in the act of June 30, 1906 (34 Stat., 798, infra, and Appendix), and undeniably the scope of the immunity under the two acts is precisely the same. For all practical purposes they were assimilated by the Supreme Court, in sustaining the constitutionality of the immunity provision as applicable to cases arising under the Sherman law, when the question came before it in *Hale* v. *Henkel* (201 U. S., 43). The history of the legislation and litigation on the subject was there briefly reviewed and summarized.

> The interdiction of the fifth amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away the amendment

ceases to apply. * * * It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman* v. *Hitchcock*, in which the immunity offered by Revised Statutes, section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown* v. *Walker* (161 U. S., 591) to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. (201 U. S., 67.)

We again see the interdependence of the immunity statute and the privilege of the fifth amendment—that one is deemed the substitute or equivalent of the other and, therefore, displaces it.

The statement in the petitioner's brief that the act of 1903 was passed to correct the syntax of the act of 1893 in respect to the words "excused" and "but" (Brief, p. 33), and in order to remove "the former condition or semblance of condition that the witness must offer an excuse and be overruled before immunity issues" (Brief, p. 33; see p. 35), has no basis in the legislative history or in the history of the decisions on the subject.

The final chapter of this legislative history resulted from the decision in *United States* v. *Armour* (142 Fed.,

906, supra). In that case it was held by District Judge Humphrey that under the immunity provisions of the Act of February 14, 1903, applicable to inquiries before the Commissioner of Corporations, the witness secured immunity from prosecution although the testimony was not given under oath or in obedience to a subpœna. Congress promptly passed the act of June 30, 1906 (34 Stat., 798; see Appendix), declaring that immunity under the various acts shall extend only to a "natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath." That Judge Humphrey did not accurately interpret the legislative intent as to immunity statutes is further manifested by the fact that his decision led to the enactment of the criminal appeals act (act of Mar. 2, 1907, c. 2564, 34 Stat., 1246), which gave the United States thereafter a right of appeal to the Supreme Court in criminal cases from adverse decisions of the district and circuit courts upon questions involving statutory construction.

The theory underlying all this legislative history is one of exchange of immunity for privilege, and not a governmental bounty in furtherance of infractions of the law, by gratuitously immunizing persons liable to prosecution. (*U. S.* v. *Kimball*, 117 F. R., 156, 163, 166, 168, *supra*.)

IV.—No possible public policy calls for an extension of the immunity statute to the giving of innocent evidence not protected by the constitutional privilege.

It is absurd to argue that thus to limit the statute would letter full and free governmental inquiry into violations of law. For the only barrier to such inquiry is the constitutional privilege. Apart from that exception, the field of inquiry is free and unlimited. All other but incriminatory evidence is compellable. The exception is well defined. The occasions when it can be invoked are well settled through the decisions of a century and more. The standard of measurement for the immunity statute is therefore equally well defined and fixed, and if the immunity is coextensive with the privilege, there is no possible "twilight zone" of uncertainty.

On the other hand, a contrary construction leaves the immunity statute without fixed and defined standards, and therefore difficult of application. Beyond that, however, such a construction is opposed to the very public policy which lies back of the immunity statute, for it assumes that it was the purpose of the legislature "to make the inducement to testify 'attractive' by holding out a substitute for the constitutional privilege, and a bribe, so to speak, as to matters beyond its scope as well." (Marshall, J., in *State* v. *Murphy*, 128 Wis., 201, 218.)

Second. None of the evidence adduced by Heike was incriminating, and none of it could have been withheld by him under the constitutional privilege.

This point is very luminously and briefly demonstrated in Mr. Solicitor General Lehmann's brief in the petition for certiorari herein (pp. 10–17).

Of course every fact in the world in some way "concerns" every other fact in the world. "The only thing about anything is that everything is behind it." By a chain of "twenty questions" in the old game, one can link any beam of any star with any crime that ever was committed.

The constitutional privilege, however, is limited to such facts as would involve a reasonable probability of danger to the witness.

This is the true scope of the rule, adduced by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14692*e*, pp. 38, 40. More recently the nature of the privilege was thus defined by the Supreme Court in *Brown* v. *Walker*, 161 U. S., 591, 599, quoting from the opinion of Chief Justice Cockburn in the leading case of *Queen* v. *Boyes*, 1 B. & S., 311, 321:

> . . . To entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the offence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. . . . Further than this we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary or unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. (*1 B. & S.*, at p. 329, *p. 330.)

So the rule was clearly stated by Judge Taft in a case very close on its facts to the case at bar:

> The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. (*Ex parte Irvine*, 74 Fed., p. 960.)

Judge Martin, in rendering his decision on the special trial, had this principle exactly in mind and stated the question on trial before him with precision and clearness (pp. 267–268).

Perhaps the most illuminating and conclusive answer to this question was Hieke's own, that he did not consider that any of his evidence tended to incriminate or connect him with the sugar frauds (folios 388, 389, 392, 486–488, 545–548, 529–530).

As Judge Martin put it:

> The defendant testified in this trial that no question was put to him or any request made of him whereby his guilt of the charges set forth in this indictment was even thought of by him. If he did not think of it, how can it be conceived that the attorney for the Government thought of it? (Folio 805. See also folio 812.)

After a full and painstaking trial, Judge Martin decided that none of the Heike evidence tended to incriminate him or was privileged within the rule as laid down (folios 812, 802).

And even after the subsequent trial on the merits, with all the ramifications of the actual proof of the crime before him, he still remained of the same opinion, for he denied the motion for a new trial and the motion in arrest of judgment.

We are totally unable to understand the repeated statements in the petitioner's brief to the effect that the Heike evidence in question did in fact lead to the discovery of the sugar frauds and was "so useful" in their prosecution (brief, pp. 76, 77, etc.).

These statements are not only absolutely untrue but they have not the slightest foundation either in or out of the record. If accepted by the court they would necessarily lead to a misapprehension of a vital fact.

As to the assertions that Heike's alleged immunizing evidence led to the discovery of the sugar-weighing frauds themselves, it is not necessary to

rest on the patent absurdity of the supposition, but the chronology is conclusive. The earliest of the alleged immunizing testimony was given in June, 1909 (folio 105). On the *preceding March 5*, after a long trial, a verdict had been rendered against the corporation and in the Government's favor for $134,000 penalties for these very frauds (folio 2327). The senior counsel now filing this brief represented the corporation on that trial. In fact, these frauds were discovered by Richard Parr on November 20, 1907 (folio 1333), and Heike himself admitted that at the time of his appearances he was perfectly well aware of the prior discovery of the frauds and the prosecutions therefor (e. g., folios 378–384, 492).

The other assertions that the alleged immunizing evidence was a basis of the prosecution of Heike personally are equally false and without a shred of support. The trial judge emphatically negatived any such possibility. (Record, pp. 271–272.)

The two proceedings were conducted separately and by different counsel (e. g., folios 445, 378–384, Special Trial Exhibits J, p. 282, and S, p. 279, and 17, p. 316).

Taking the items of evidence one by one, it becomes perfectly plain that the trial court and Heike himself were entirely correct in believing that none of them could reasonably endanger him or did in fact tend to incriminate him.

1. **Heike's name and identity were not self-incriminating.**

No argument can be necessary, but we may refer to the passage above quoted from the *Irvine* case, to

the decision of this court in *Holt* v. *United States* (218 U. S., 245, 252–253), and to *United States* v. *Price* (163 F. R., 904, 907).

2. The fact that Heike was secretary and treasurer of the corporation was not self-incriminating.

This claim was characterized as "preposterous" by the Court of Appeals (folios 4931–4932) and by the trial court as involving a "perversion of justice" (folio 803).

He had held these offices for nine and eleven years, respectively, and the knowledge thereof was notorious. On the special trial he testified:

> Q. Isn't it a fact that you have given out information, as to the offices which you hold, to a great many different books and papers of publicity in this city? * * *—A. Undoubtedly; yes. I never denied I was secretary and treasurer.
>
> Q. The fact that you are secretary and the secretary and treasurer of these companies is a fact which appears, for instance, in Moody's Manual?—A. I never denied it.
>
> Q. And in the Corporation Directory?—A. Yes, sir.
>
> Q. And Dun's Agency?—A. I don't know; it may have.
>
> Q. And all the different vehicles of corporate information that were published in the city, so far as you know?—A. Yes (folios 489, 503).

3. The signatures on the Kissel checks did not tend to incriminate him in the weighing frauds.

This claim was disposed of by the Court of Appeals, at folios 4932–4934.

On one detail at this point the Court of Appeals may have misunderstood the facts. They say (folio 4033) that Heike testified before the grand jury that these signatures were written by him. So far as we can find he did not so testify. What he said to that effect was at the trial of the plea in bar itself (folio 283ff). He seems rather carefully to have avoided stating that he testified before the grand jury to the *authenticity* of these signatures, but merely that he produced the checks "in response to questions addressed by Mr. Crim" to him (folios 283–284).

However, for the reasons stated by the Court of Appeals, the testimony if given would not have been incriminating.

It is undisputed that Heike knew that these checks related exclusively to the Segal-Kissel transaction (fol. 385). So far as the signature on these checks establishes Heike's position as treasurer and his function as such, the evidence is of no larger import than his specific testimony to that effect which we have just considered. So far as this testimony bears on the fact of Heike's handwriting, it must, of course, be conceded by the other side that under the Federal rule the admitted handwriting on the Kissel checks could not even be used as standards of comparison in any possible case for customs frauds. (See *Hickory* v. *United States*, 151 U. S., 303.) But in addition it appears convincingly from the record that Heike's handwriting was a matter of

public property and had the widest possible currency.

Q. How many letters and other papers on the part of the company do you sign during the course of a year?—A. Very many letters.

Q. A great many.—A. A great many letters.

Q. And you send those all over the country?—A. All to our customers, yes, and others.

Q. Do you communicate with different stockholders?—A. Yes. As a rule, though, the New Jersey company does; the stockholders are all New Jersey stockholders.

Q. As secretary one of your commonest duties is to sign your name, isn't it?—A. Yes; quite so.

Q. In the company's business?—A. Yes (fols. 527–8).

Foster testified to having counted fifteen to seventeen thousand letters signed by Heike in the company's letter books (folios 2343–2344).

4. The testimony concerning the incorporation of the company and its ownership of the Havemeyer and Elder Refinery was not self-incriminating.

This claim was disposed of by the Court of Appeals at fol. 4032.

The statement in petitioner's brief (p. 14) that he "furnished evidence . . . of the ownership of the property belonging to said refinery, including the scales upon which the fraudulent weighing was made," should not be construed by the court as meaning more than that he testified to the ownership of that

refinery. Of course there was no query or testimony in reference specifically to "scales" or "fraudulent weighing" (fols. 255, 296, 299).

The whole scope of investigation of the December, 1909, grand jury, as we have seen, was an inquiry into the legality, under the Sherman law, of the American Sugar Refining Co. and its subsidiary corporations. The production of the corporate records, of which Heike was the custodian, was called for by the grand jury to ascertain the history of the formation of the American Sugar Refining Co., its successive acquisitions of the various constituent refineries and their resulting effect; and Heike's testimony was entirely confined to these facts (fols. 293–302, 404–409). Most of the facts elicited were matters of court record (fols. 406–409), and all of them were corporate records contained in the minutes of the various companies, and Heike's testimony was practically a reference to, and recital of, these minutes (fols. 300 *et seq.*), or, as the Court of Appeals described it, "an index" (fol. 4932).

5. Special Trial Exhibit 18 (R., p. 317) was not incriminating and was not privileged.

This was dealt with by the trial court at folio 1804ff and by the court of appeals at folio 4935ff.

(a) The exhibit was volunteered and was not produced "in obedience to a subpœna," which is the minimum requirement to a claim of immunity. (See act of June 30, 1906; 34 Stat., 798, appendix.)

Neither the statement nor anything like it was called for by the subpœna addressed to Heike. (See

Deft.'s Exhibit 16, p. 314.)[1] By letter Heike was asked to produce, *not these meltings*, but "a list of the actual *production of refined sugar*" by the various refineries of the sugar company. (Exhibit 17, folio 948, p. 316.) He did not possess this information, and promised to procure it.

> Q. When he asked you for the quantity of the production by those various companies of those years, what answer did you make?—A. I said I would procure it for him; I didn't know it. I mean procure the information; we haven't it by heart" (folio 307).

Heike was unable to comply with this request for the production of refined sugar, and, according to his own testimony, "I gave them the next best I had" (fols. 316, 320).

Heike then testified that in the grand-jury room he was later asked to produce the meltings, and in response to that request produced Exhibit 18 (fol. 321); but on cross-examination, after having his memory refreshed by the stenographic minutes, *he admitted that the production of this statement was voluntary.*

> Q. And this is the paper which you produced, which I show you?—A. Yes; that is it, no doubt.
>
> Q. Now that you are wrong that far, Mr. Heike, read that and see if that does not refresh your mind that you *volunteered* this in-

[1] At folio 402, the witness appears to have testified that it was referred to in the subpœna. The subpœna, however, speaks for itself, and it is impossible to find any reference therein to the subject of meltings and melting capacity.

formation.—A. (After reading minutes.) Yes; that is so.

Q. Now, this paper which you produce in that way, on that day, contained the melting capacity of the different refineries?—A. Yes, sir; it contains the melting capacity (fols. 399–400; see also fols. 553–555).

In view of this cross-examination Heike's testimony was sought to be bolstered up on redirect. He then testified that he produced this statement to the grand jury on January 5, 1910, as a result of a request made to him in the grand-jury room on December 1 (fol. 567).

We submit, in view of the conflicting character of Heike's own testimony, that it might well be held that the minutes of the grand jury were correct in showing that Heike "volunteered this information" (fol. 400). On this branch certainly Heike hardly established the burden that was upon him to show that he produced this statement "in obedience to a subpœna."

(*b*) Even assuming, however, that this tabulation was not volunteered, it was still not within the privilege, for it was entirely a corporate document, compiled not by Heike, but by others and produced by him merely as a messenger in his official capacity in behalf of the corporation (folios 557–560). He was himself admittedly ignorant of the information which it contained. He served merely as the conduit for its production from the corporate records.

Q. And as a matter of fact didn't you, now that you think it over, know that you went

and got these from other people—the facts embodied, for instance, in Exhibit 18?—A. From the books, certainly. You mean I kept all these books myself?

Q. You do not keep them yourself?—A. No; not at all.

Q. They are not in your custody?—A. I am in charge of all the books of the company; nobody expects me to keep them myself.

Q. You did not make the entries?—A. No.

Q. Other people do?—A. Precisely.

Q. And didn't you tell Mr. Knapp that that was something out of your field—that you were not a practical sugar man?—A. I guess not. I could give no information whatever to them. Everything they asked me is not written by me.

Q. At the time he asked you you did not have the information in your home anyhow?—A. No; it is quite so.

Q. And you had to ask other people before you could get it?—A. I directed them to make up for me; yes.

The COURT. Who made up that list?

The WITNESS. Somebody else did for me.

Q. You did not personally make this up?—A. Not at all.

Q. Made by others?—A. At my request.

Q. And it was all made from information belonging to the company?—A. Belonging to the company (fols. 557–559).

In other words, Heike produced a compilation of corporate information contained in corporate books in the company's possession, the entries in which

were recorded by others than himself. Of course a compilation is a mere convenience, and has no greater evidentiary value than the original book of which it is an abstract. (See *Hayden* v. *Williams*, 96 Fed., 279, 281–282.) But in this case even the compilation which Heike produced was made by others, and upon the trial, in support of his plea of immunity, his ignorance of the information embodied in the statement was conceded (folios 689–690).

It is now well settled that evidence of such transactions and such corporate information may be compelled, unlimited by any claim of personal privilege whatever.

In *Wilson* v. *United States* (221 U. S., 361) this court held that the production of corporate records may be compelled even against an officer who actually holds the physical possession thereof and though the contents thereof would tend to incriminate him. We quote from the opinion of Mr. Justice Hughes:

> The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct he could not withhold its books to save it; and if he were implicated in the violations of law he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated, in its effective exercise if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a con-

> clusion. It would not be a recognition, but an unjustifiable extension of the personal rights they enjoy (p. 384).

In *Dreier* v. *United States* (221 U. S., 394), decided together with the *Wilson* case, it was held to be immaterial that the subpœna was addressed not to the corporation, but to the custodian. The duty is the corporate duty, and the form in which this duty is exacted from the corporation is of no consequence:

> By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process. *Wilson* v. *United States*, decided this day. In that case the writ was directed to the corporation, and here it was directed to the custodian. As he had no privilege with respect to the corporate books and papers, it was his duty to obey:

These cases were sought to be distinguished from the one at bar by reason of the fact that Heike here produced not the original corporate books, but compilations therefrom. In the first place, the evidence shows that the compilation was not his work, but that of others (fols. 557–559). But beyond that the compilation from the books summarizing the contents of the books can not carry with it greater privileges than the production of the original books. It is merely a convenience to avoid the production of the books. Finally, the distinction is conclusively disposed of by the decision in *Baltimore & Ohio* v. *Interstate Commerce Commission* (221 U. S., 612).

In that case the court sustained the validity of an order of the Interstate Commerce Commission compelling carriers to make *reports* showing the instances where employees subject to the act of March 4, 1907, had been on duty for a longer period than that allowed, which fact subjected the carrier to liability for penalties. The opinion finally formulates the controlling principles governing this whole subject:

> Nor can the corporation plead a privilege against self-crimination under the fifth amendment (*Hale* v. *Henkel*, 201 U. S., pp. 74, 75; *Hammond Packing Company* v. *Arkansas*, 212 U. S., pp. 348, 349; *Wilson* v. *United States*, decided May 15, 1911). With respect to its officers it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which can not be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and can not claim a personal privilege in hostility to the requirement (*Wilson* v. *United States*, *supra*). (P. 226.)

(c) Finally, the tabulation was not self-incriminating.

Heike's entire lack of personal connection with, knowledge of, or responsibility for this tabulation or the entries from which it was drawn (folios 557–559, 689–690 and *supra*) bring it, aside from all other considerations, within the decision of Chief Justice Marshall in *Burr's* case, *supra*. In that case, Willie, Burr's private secretary, was interrogated about the contents of a cipher letter written by Burr, and he refused to state its contents on the ground that the letter bore upon the charge of treason and his answer to the question would have a tendency to incriminate him of misprision of treason. Chief Justice Marshall overruled the claim of privilege on the ground that though compelled to testify as to the treasonable letter, the question did not involve his knowledge of its contents at the time the letter was sent:

> On hearing the question more particularly and precisely stated, and finding that it refers only to the personal knowledge of the cipher, it appears to the Court that the question may be answered without implicating the witness, because his presence would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial or afford the means of proving that fact. (*United States* v. *Burr*, 25 Fed. Cas., p. 40.)

A similar ruling was made by Judge Taft in *Ex parte Irvine*, 74 Fed., 954, *supra*, in which he held the fact that a witness knew that a package, which he had previously carried, contained lottery tickets, did not show that he knew so at the time or would have a

tendency to implicate him in the crime of having knowingly transported lottery tickets (74 Fed., 954, 965).

These considerations in our judgment conclusively dispose of this case, as both the courts below held, and we should leave the argument here were it not for the accusation repeatedly made in the petitioner's brief that his evidence, and particularly this exhibit, brought about the discovery of the funds and were used in detecting and prosecuting them.

This is not the fact and has no basis in or out of the record.

In actual truth this exhibit, judged even in the light of the full knowledge presented by the final trial, was entirely innocuous, was not even suspicious, and was not (and could not possibly have been) of the slightest aid in any prosecution.

To demonstrate this requires some analysis of the proof, with which, under the circumstances, we feel obliged to burden the court.

The scales and springs.

The substantive crime itself consisted in the use of steel springs run through the stanchions of the seventeen customs scales in such a way that when applied by the company's tallymen sitting in dark corners beside these stanchions they reduced the weights (folios 1336 to 1354, 1437). On the so-called "Invoice" or "Cost and Freight" cargoes (which were purchased on the foreign invoice weights and of which the Government was the *only* weigher on this

side the water), a heavy spring was used, which made a difference estimated at about 20 pounds a draft by one witness (folio 1449), whereas on the so-called "Landed weight" cargoes (which were purchased on the weights ascertained by city weighers weighing on the docks close beside the Government weighers) a lighter spring was used, which gave a difference of about 10 pounds a draft, according to the same witness (folio 1449). The particular spring found by Parr in actual use made a difference of 14 to 18 pounds on the drafts which had just been weighed (folios 1336–1354).

The physical condition of the holes through which the springs ran and of the levers on which the springs rested showed long wear (folio 1505ff and Exhibits 16b, 17, 19, 23, 23a, 24, 24a, 27, 28).

The Pink Book Tables.

The actual use of these springs on the specific cargoes, constituting the *corpus delicti*, and the identity of the men who actually operated them were shown by the so-called Pink Book Tables. (Exhibit 56, p. 1562.) These tables consisted of a comparison, cargo by cargo, of the Government weights, as shown by the official Government dock books with the city weighers' weights (on which the company purchased), taken instantly after the Government's weighing and recorded by the company's checkers in the so-called Pink Books. The foundation in proof for the Pink Books is hereinafter described in the point on that subject.

These tables showed (1) that on every cargo (with a certain illuminating exception hereinafter discussed)[1] prior to Parr's discovery of the spring, the city weigher exceeded the Government weights by an average of 13 pounds a draft; (2) that after the discovery of the spring the weights were nip and tuck, with a very slight net advantage (38 hundredths of a pound) in the long run to the Government; (3) that a certain fixed group of company tallymen were always sitting beside the holes when these differences occurred (column 14); (4) that in the illuminating exceptional cases, "noninterference period," all the tallymen were used indiscriminately; and (5) that when there ceased to be tallymen sitting beside the holes the differences ceased.

"Spitzer's gang."

This particular group of tallymen, called by one witness "Spitzer's gang," received extra pay in secret (folios 1883, 1443, 1490, 1770, 1877, 1767, 1863), as compared with the other tallymen who did not sit beside the holes (except when the springs were not being used). Spitzer, the dock superintendent, and four of this gang (Kehoe, Boyle, Coyle,

[1] In fact there were two classes of exceptions. One of these was the cargoes packed in hogsheads (indicated by "HHDS" in column 5 of the Pink Book Tables), and on these the springs were not used because the Government weight was required to be physically scored on the face of the hogshead (folios 1744–1745, 1451–1453).

The other class of exceptions was the cargoes which came in during the "noninterference period" hereinafter explained.

and Hennessey) were convicted in November, 1909 (folio 1791), the backbone of the evidence being that summarily outlined above.

The remaining two of this gang of checkers (Voelker and Halligan), together with Spitzer's assistant foreman, Walker, were indicted in the case at bar, and after the dramatic confession of Spitzer in the midst of the trial (p. 573), corroborated by the confession of Schwerdtfeger, a former member of the gang (p. 480), they all three pleaded guilty.

The proof of Heike's connection with the fraud.

Thus far there was nothing to connect either Heike or Gerbracht with the crime, and nothing on which Special Trial Exhibit 18 could possibly throw any light whatever.

But obviously such a situation as that disclosed by the Pink Book Tables must have very radical and pervasive effects in the accounts and operating results of the company;[1] and, in fact, the discrepancies between the weights on which the company paid the merchants for the sugars and the weights on which the company paid duties blazed a broad trail all the way from the pink books on the docks to Wall Street, both directly and via the office of Gerbracht, the manager of the refinery.

---

[1] The annual profit resulting from the fraud was sufficient to pay an annual dividend of more than 5 per cent on the capital of the New York corporation of $2,500,000. The record shows an arithmetical error in saying "something over 3 per cent" (folio 2340).

The purchase weights and the duty weights.

In any honest course of business it is self-evident that the system of accounts would bring the duty weights and the purchase weights side by side into comparison for the purpose of mutual check. Heike, as secretary and treasurer, had charge of the structure of the company's accounts. (See *e. g.* Exhibits 78, 82, 83, 84, 85, 88, 89, 90, 91, 101.) After leaving the dock these two lines of figures were kept entirely apart so far as the open system was concerned. The man who checked the merchants' bills accepted their weights without comparing them with the duty weights, and the man who checked the bills for duty accepted the Government weights without comparing them with the merchants' weights. *Yet these two men sat in the same room only three feet apart* (folios 1975–7), one of them checking, for instance, the merchants' bill for 9,426,516 lbs. on the "H. W. Jarlsburg" of March 29, 1906 (Exhibit 56, p. 1562), and the other checking the Government's bill for only 9,276,476 lbs. on the same cargo, and neither looking at the other's figures, but permitting their company to pay the merchants for 150,040 lbs., which were never there if the Government weights were correct.

The Schmelter Tables.

Plainly, at least some secret track must be kept of such a thing, and here is one of the immediate and conclusive connections of Heike with the crime. These two clerks, sitting side by side, as above stated, each blind in the neighboring eye, transmitted their

figures (the one being the purchase weights and the other the duty weights) separately to a clerk named Schmelter, who, under the orders of Havemeyer, the president (who died shortly after the discovery of the frauds), supplemented by orders of Heike himself, secretly drew the lines together in the so-called Schmelter tables, which he kept for the private information of Havemeyer and Heike, and which, in a somewhat ingeniously veiled form, not necessary here to explain, showed the discrepancies, cargo by cargo (folios 3470, 3559–60, 3566ff., 3474ff., 3490, 3559; and see particularly Heike's cross-examination, folios 3176–3179, 3463–3466, 3540, 3488–3491, and his finally being forced into a corner by a juror, folios 3558–3567, 3570). The veiled and indirect form which this comparison took was dropped on the very cargo on which Parr discovered the spring, and thereafter a direct and frank comparison was made (folio 3369 and the Schmelter Tables).

Incidentally, these tables not only disclosed the enormous discrepancy against the Government, but they necessarily showed Havemeyer and Heike that their company was paying to the merchants immense sums which were never due if the Government weights were correct.

The refund checks.

The preliminary payments of duty were made on the weights as shown by the foreign invoices attached to the entry papers (folios 1068, 1080). These weights were correct excepting that they were slightly

excessive by reason of shrinkage on the voyage. After the Government weights had been taken (with the aid of the spring) (folios 1111, 1219, 1443) the duties were liquidated thereon (folios 1070, 1111), and as these weights were falsely low, refunds of the "excess" temporarily collected pending the liquidation were made by Government drafts to the company. These refunds represented substantially the amount of the fraud. These drafts were, many of them, indorsed by Heike, as treasurer. (Exhibits 3, 4, 5, and 13, and folios 57–63.)

The technical statements.

But another line of proof was developed against Heike (and also Gerbracht) which was even more conclusive, and this is the point at which melting weights (but not anything like Special Trial Exhibit 18) came into the case.

The company purchased its sugar on two fundamentally different bases (folios 1577, 1599, 1612, 1957, 3562):

(1) The so-called *landed weight cargoes* were paid for on the weights as landed on the company's dock, and these cargoes were weighed by the city weighers adjoining the Government weighers.

(2) The so-called *invoice weight cargoes* (or "Cost and freight cargoes") were paid for on the foreign invoice weights (less an allowance for shrinkage), and these cargoes were not weighed at the refinery except by the Government weighers. The bulk of these cargoes were from Java.

This distinction is vital and runs through the whole case.

The most important and decisive effect was in connection with the operating reports of the refinery. How was the efficiency of the refinery to be gauged? How were the operations (consisting of the transmutation of raw into refined sugar) to be measured and reported?

On the landed weight cargoes there would be two available weights for the raw sugar—weights with which the melt was to be charged—the Government weight and the city weighers' weight. The Government weights though lower, and therefore more favorable to the refinery, were rejected, and the city weighers' weights, though higher and a severer charge against the refinery, were taken (folios 1827–1828, 1893, 1901, 1905–1906, 3484–3485.)

But on the invoice weight cargoes there was no weight this side the water except the Government weight, and that, therefore, had to be used as the melting weight *on those cargoes* (folios 1828, 1956).

It must therefore follow that if the Government weights were too low, the efficiency of the refinery would be too high in the months in which the Government weights were used as the melt weights. In other words, as the efficiency of the refinery is the ratio between the raw sugar taken in and the refined sugar turned out, that efficiency must be exaggerated whenever the quantity of raw sugar charged is less than the quantity which actually went into the melt. Whenever the refiner got more sugar than he was

charged with it must follow mathematically that he would turn out an excessive profit.

Conceivably, then, it might appear that in the Java months, when the Government weights were used as the bulk of the melt weights, there might even be a greater outturn of saccharine matter shown in the refined sugar than existed at all in the raw sugar *as charged*.

To ascertain whether this was the fact, a search was made for the monthly technical statements which constituted the reports to Wall St. of the refinery efficiency. It was found, however, that *for the period prior to the discovery of the fraud* both Gerbracht's file copies at the refinery (folios 1997, 2004–7, 2011, 2013) and Heike's copies at Wall St. (folios 2324–6) had disappeared (folios above cited), Heike's copies having been destroyed by his orders immediately after the verdict against the company for these frauds (folios 2324–6).

But the mass of books which contained the basic detailed figures (folios 2067, 2127) were found (Ex. 61 to 66, folios 2066, 2067, 2094) with the exception of the data known as "Stock in process," which was missing as to the year 1907 (folio 1999). With these data, a Government liquidator, Harry H. Waters, with remarkable skill, following exactly the method of the original construction, reconstructed all the monthly technical statements from 1902 through 1907 (Exs. 68 to 72, folio 2183). It took him, with fifteen assistants, six months to do this work (folio 2138ff), and so perfectly was it done that no flaw

could be found in it by the defense, and the accuracy of the statements as reproductions of the missing originals was practically conceded.

The result was a complete demonstration of the fraud, tallying exactly with the result of the Pink Book Tables and the Schmelter Tables.

In the Java months (*when the Government weights were used as the melt weights*) Gerbracht's reports to Heike showed a production of *more* saccharine matter in the refined than was contained in the raw which he reported as having received (folios 2193–6). In other words, the ultimate efficient figure called "*loss* in refining" was a *plus* (folios 2192–7). As the proportion of Java (that is, Government weight in the raw) fluctuated, the apparent efficiency fluctuated, the Java months showing *pluses* and the landed weight months showing the proper *minuses*. For example, in October, 1904, the Java sugar (i.e. the Government weight) was 81.49 % of the melt. The so-called "*loss* in refining," which of course is a mechanical necessity, was a *gain* of 3.58 %. That is to say, that for every 100 pounds of crystallizable matter reported as having gone into the melt (Government weight) there was turned out 103.58 pounds of crystallizable in the refined product. In July, 1905, however, when the percentage of Java had dropped to *zero* (and the melt weights were therefore substantially entirely the city weighers' weights), there was a true loss of 2.26 %, or a production of 97.74 pounds of crystallizable in the refined out of each 100 in the raw.

These results were all graphically summarized by exhibits showing the monthly percentages of Java sugar (Ex. 113, p. 1618) and the monthly "Loss in refining" (Ex. 109, p. 1612; Exs. 107 and 108, pp. 1610–1611). See folios 2186, 2190, 3081.

After the discovery of the spring there were no more *pluses* (except a negligible small one in November, 1908, such as sometimes occur owing to clerical errors or difficulty in estimating stock in process, averaged by the succeeding months, folios 2119–2120, 2112), *despite the heavy importations of Java sugar after 1907.*

Heike's correction of Gerbracht's impossible technical statements.

Naturally Heike did not accept these nineteenth century alchemies with any naiveté. He corrected the monthly statements where there were *pluses* by adding to the melting weights, *which were in those cases the Government weights* (invoice cargoes), the amount by which those Government weights were short of the truth, i. e., the amount of the fraud on those cargoes (folios 3345, 3347, 3504, 3506, 3508–9, 3412–4). Thereby he reduced the "*losses* in refining" in the *plus* months to *minuses*.

The Montgomery books and the red ink additions.

In this connection Heike had another private set of accounts—the Montgomery books, devised and arranged by Heike and kept solely for him (folios 2262ff, 3535, 3566, 2281, 3908). By these books Heike kept an account of the refinery melt weights

as reported cargo by cargo (i. e., the Government weights on invoice cargoes and the city weigher's weights on landed cargoes), made additions in red ink to bring the deficiency of the Government weights up to the true receipts of the refinery, and called these new totals the "Refinery weights *as charged*" (folios 2268ff, 3441ff, 3501; Ex. 110; folios 2283–5). This system was continued until the discovery of the spring, when, as Heike testified, "came these disclosures, and the whole thing changed" (folio 3389).

The Turner letter.

The purpose of these accounts and the fact that they were necessitated by the falsity of the Government weights were fully explained by Heike himself in his letter dated Dec. 24, 1904, to Frank G. Turner, superintendent of the company's refinery at Boston. This letter (Ex. 78, italics ours) was as follows:

> DEAR SIR: I spoke to Mr. Thomas the other day in reference to a change we wish to make in your melting account in order to have conform with the melting account of the other refineries, and which will facilitate the comparison of the workings of our several houses.
>
> *I made a change in New York several years ago when we found that cargoes of sugar melted at our refineries showed larger losses in weight than it was reasonable to expect.* That the difference was not due to *actual* losses was shown by the technical statements, which frequently gave large gains in the percentage of crystallizable sugar. If you have looked at

your technical statements, you will have noticed the same at the Boston refinery. The month of July showed a gain of +0.34, September +0.37, and October +0.58.

These differences are due to two causes. First, the desire of the superintendents to make as good a showing of their work as possible. Second, *to the liberal weights and tares which we receive from the customhouse, and which, of course, we do not undertake to correct. These customhouse weights are generally taken as a basis for the meltings.*

To charge the meltings on the *proper* basis, we have adopted the following system. Of each lot melted I compare the number of pounds reported as melted with the actual number for which we paid, and if there is any difference, I charge the melting account as follows:

1. On sugars bought *on landed weight, refinery is charged with the full number of pounds for which we have paid.*

2. On sugars bought *on invoice weight*—that is, on invoices from foreign countries—*I allow to the refinery*—

a. On Java sugars a loss of 1%; that is, if the refinery weight would show a loss of 2%, I add the 1% to the meltings.

b. On sugars from Cuba, the invoices of which are rendered in Spanish pounds, I allow the refinery the difference between Spanish and American pounds. That is, I charge the refinery the full number of pounds for which we have paid.

c. Sugars from English West India Islands (Jamaica, Antigua, Barbados, etc.) I allow a loss of ½%.

d. On beet sugars I allow a loss of ¼%.

I make these changes in the office in New York and I do not alter the accounts at the refinery, as it does not seem to me desirable that there should be two sets of weights on the books of the refinery. One set, for instance, representing the custom-house weight on which duty is paid, and another set representing melting weights, giving a larger number of pounds.

It will be most convenient for you after your statement of raw sugar melted has been completed, to add these differences to each lot.

The correction of the technical statement I shall make here in New York.

Yours, very truly,

(Sgd.) C. R. Heike,
Sec'y."

See also fol. 4883 and Ex. 89, fol. 4776, and folios 3160, 3509, 2302.

The Havemeyer letter and the "noninterference period."

Every defense advanced by Heike was exploded by the so-called "noninterference period."

It appeared that on November 15, 1906, Heike was haled into court as a witness to produce books and papers in the Government's prosecution against his company for rebating (fols. 3349, 3354). On the same day he conferred with Havemeyer on the shortage in the customs weights, and Havemeyer thereupon

wrote the following astounding letter to Gerbracht (Ex. 8, fol. 3192):

> DEAR SIR:
>
> Mr. Heike to-day brings to my attention his belief that the customhouse weights of Java sugars on Havemeyer's docks are rather more liberal than at other places. Of course, I know you are not concerned with any matters to produce such results, and I want to caution you about you or any of your representatives having anything whatever to do with any Government employees. Let them do their work irrespective of any interference in any way by us.
>
> Yours, truly,
>
> H. O. HAVEMEYER.

Gerbracht admitted the receipt of this letter (folios 2743, 3931). He sent the letter to Spitzer on the docks (folios 2744, 3931), or, as Spitzer testified, telephoned him anonymously, "to be careful and look out for his weights" (folio 1757).

Thereupon Spitzer stopped his gang from using the springs (folio 1758), the fixed gang ceased to be the exclusive tallymen on the Government scales (Pink Book tables, col. 14, Ex. 56, pp. 1562 ff), the differences against the Government ceased (Pink Book Tables, *supra*), the Schmelter tables ceased to show discrepancies against the Government (see folios 3570–3571 and the tables), the *pluses* on the technical statements practically disappeared (Ex. 109, p. 1613), and the Montgomery books ceased

to show a single red-ink addition, except as to cargoes which had arrived before the word of warning (folios 3356, 3363).

The reappearance of the fraud.

This condition continued for about three months until the rebate prosecutions were concluded (folios 1758, 1760), when Spitzer resumed the use of the spring (folio 1760), the fixed gang reappeared in column 14 of the pink book tables (Ex. 56, pp. 156, 26), the differences against the Government reappeared on those tables, and on the Schmelter tables, the pluses on the technical statements reappeared (Ex. 109, p. 1613), and the Montgomery books resumed the red-ink additions to the Government weights (folio 3363).

The final discovery.

Then finally when the spring was discovered on November 20, 1907, all these conditions instantly changed again and this time permanently. (See exhibits and folios as above.)

Effect on Heike's defense.

Heike's principal defense, that he believed the falsity of the Government weights was due to a policy of "liberal weighing" by the Government (folios 3348–3349), was of course destroyed by the fact, known to him, that the discrepancies in all their phases ceased coincidentally with his suggestion to Havemeyer, and did not reappear until after the conclusion of the rebate prosecutions.

Even if Heike ever believed that the discrepancies were due to an intentional governmental policy of "liberality" (which in fact he never did believe, folio 3326, in connection with 3438, 1959, and also folios 2864, 2871), how was it possible for him to continue that belief when the "noninterference" period had terminated and all the irregularities reappeared? (Cf. *U. S.* v. *Noblom*, 27 Fed. Cas. 185.)

The alternative defense that the discrepancies were due to exaggeration of the purchase weights was similarly demolished.

The absurdity of the assertion that Special Trial Ex. 18 could be incriminating.

This is the case in its substantial outlines, and in the light of it we believe no man ever could discover any incriminating or even suspicious quality in the Exhibit 18. Heike's own failure to see any such quality in it is substantially decisive (folios 388, 486–488, 529).

True, it concerned the H. & E. Refinery, and it concerned raw sugar, and it concerned melting weight, but it did not concern them in any aspect in which they could possibly be indicative of guilt or significant in this case. Those were things no more incriminating than Heike's name, or the incorporation of the American Sugar Refining Company, or the fact that it imported raw sugar.

The tabulation gave only the aggregate annual melting in an indistinguishable total mass, not indicating even whether the figures were the aggregate

of the meltings "as reported" or the meltings "as charged," while the only *incriminating* melting figures were the figures, cargo by cargo and month by month, showing the variations which corresponded to the fluctuations of the *Java* cargoes (in which the Government weights were used).

If it be claimed that these aggregate annual meltings could somehow have been used by comparison with some other aggregate annual weights to reveal a discrepancy (in no way apparent or hinted at on the face of the exhibit), it is sufficient to say that no such thing was imaginably possible, for the simple reason that there was nothing to show what figures these aggregates were made up from. Were they the entirely true melting weights, or were they in part the false melting weights based as to invoice cargoes on the Government weights? Were they computed *after* Heike's red-ink additions or *before*? What cargoes did they cover (for the aggregate annual melt is not coincident with the aggregate annual arrivals)? How much of the sugar was duty free? How much of it was stored (and therefore melted at a shrunk weight, folios 1823, 1826)?

Even with the whole case before us, it is impossible for us to discover any significance in this Exhibit 18, and it is utterly ridiculous to imagine that anybody could have been lead by it to suspect the frauds. Still less is it conceivable that, when the exhibit was produced, there was any reasonable probability of danger to the petitioner.

The statement concerning the effect of this exhibit made by plaintiff in error, and quoted by the Court of Appeals below (present brief, p. 18), is *in every particular item untrue in fact*, as we deliberately assert and as we have shown.

No folio references could be cited to support it.

Third. The immunity statutes do not grant immunity excepting for offenses under the acts to which they refer. As to evidence tending to incriminate a witness of other offenses entirely unrelated to such acts, he still retains the constitutional privilege.

This point was fully argued in the brief of Mr. Solicitor General Lehmann on the petition for certiorari, at pages 18–30, and we see no occasion to add anything to his argument excepting to notice the fact that in *Brown* v. *Walker* (161 U. S., 591), at pages 607–608, there is a dictum to the contrary.

SECOND POINT.

THE DIRECTION OF A VERDICT ON THE SPECIAL TRIAL OF THE PLEA IN BAR WAS PROPER.

At no time did the petitioner ask to go to the jury upon his claim of immunity (fols. 633, 637, 815). It has practically been conceded that a trial by jury of the issue raised by the plea in bar was not essential. The contrary was not urged either before the trial court or before the Circuit Court of Appeals. Even if there had been a dispute of fact, the conclusion of the trial court must stand because both sides requested the direction of a verdict. *Beutell* v. *Magone* (157 U. S., 154, 157–8).

Obviously the issue raised by the plea in bar stands on a totally different footing from one raised by a plea of not guilty. The plea of immunity is an affirmative plea of confession and avoidance and the burden of proof rests upon the petitioner. (Compare *State* v. *Ellsworth*, 131 N. C., 773; *Commonwealth* v. *Daly*, 4 Gray, Mass., 209.) This was tacitly conceded by the petitioner in successfully claiming as a matter of right the opening and closing upon the plea (fols. 181, 497).

The practice followed by the trial court was also followed in *State* v. *Murphy* (128 Wis., 201, 204, 216) and *Rudolph* v. *State* (128 Wis., 222, 226).

We see no occasion for arguing the matter further than to refer to these authorities and to the argument of Mr. Solicitor General Lehmann in his brief on the petition for the writ of certiorari herein, at pages 7 to 9, inclusive.

THIRD POINT.

THE ADMISSION OF THE SO-CALLED "PINK BOOKS" ON THE TRIAL OF THE PLEA OF NOT GUILTY WAS NOT ERROR.

First. An unnecessarily complete foundation was laid for these books.

On this point the vital facts are not correctly or fairly stated by the petitioner's brief. They say (p. 156):

> * * * The entire process of weighing was done by the city weighers. They weighed the drafts and called out the weights of each to the

checkers, who jotted them down in the pink books. The entries of the weights in the pink books were based upon what the city weighers called to the checkers. The checkers took no part in the weighing and very rarely looked to see what the scales recorded. Some of the checkers were put upon the stand by the Government. None of the city weighers who did the weighing and knew the weight of the drafts was called. The Government did not prove that the city weighers were dead or unavailable. * * *

These statements, if they had been correct, would have drawn the case near the rule laid down by Judge (now Mr. Justice) Lurton in *Chicago Lumbering Co.* v. *Hewitt* (64 F. R., 314), on which the petitioner relies at the same page. The basis of Justice Lurton's ruling (that a memorandum book should not have been admitted in evidence) was that the book before him was not made contemporaneously by persons cognizant of the facts, but was made "from the tally-board memoranda by a person other than the one who made the tally-board entries and who knew nothing of the correctness of the data transcribed" (p. 317).

The foundation laid here by the Government was totally different from that involved in Mr. Justice Lurton's case and indeed was excessively and unnecessarily elaborate and conservative. It was as follows:

(*a*) The efforts to find the individual city weighers who actually handled the beams on the city weighers'

weighs were proved to have been unwilling, it being impossible to even discover the names of these employees (fols. 2381, 2382), though the investigator "brought into play all the resources at his command" (fol. 2382).

The statement in the above quotation from the petitioner's brief that "the Government did not prove that the city weighers were dead or unavailable" is therefore erroneous.

(b) There was, however, another independent set of *first-hand eye-witnesses* to these weighings by the city weighers. The company had a group of tallymen expressly for the purpose of watching these weighings and of recording the true register of the beams directly in their own books, which were the pink books.

The purpose of the routine established for this staff by the company was to make sure that the city weighers' men did not defraud the company and to provide, on behalf of the company, a direct first-hand vigilant check on the operation of the scales by the city weighers' employees. This routine was thoroughly described in the evidence both by Falkenstein, who was in charge of the assignments (folios 1542 and 1455), and by the checkers themselves (folios 1662–1668, 1479–1480, 1638–1639, 1643–1645, 1676–1679, 1704–1705, 1619–1620, 1626–1630, 1634–1637, 1656–1662, 1646–1662, 1631–1634). The statements above quoted from the petitioner's brief that "the entire process of weighing was done by the city weighers" and that "they (the city weighers)

weighed the drafts and called out the weights of each to the checkers who jotted them down in the pink books," are therefore erroneous in their implications; and the statements that "the entries of the weights in the pink books were based upon what the city weighers called to the checkers" and that "the checkers took no part in the weighing and very rarely looked to see what the scales recorded" are directly incorrect.

(*c*) The statement that "*some* of the checkers were put upon the stand by the Government" is erroneous in its implication.

A complete list of every one of these regular tallymen who were employed at any portion of the times covered by any of the pink books included within the pink-book tables was proved (folio 1565). This list and the proof by or concerning each of them was as follows:

A. Donahue, sr., testified (folios 1662–1668).

R. Stein, dead (folios 1538–9). Signature proved (folio 1543).

F. Schwerdfeger, testified (folios 1479, 1480).

J. Voelker, defendant, on trial. Signature proved (folio 1542).

J. Coyle, convict (folios 1551–1552). Signature proved (folio 1556).

T. Kehoe, convict (folios 1551–1552). Signature proved (folio 1555).

E. Boyle, convict (folios 1551–1552). Signature proved (folio 1556).

H. Edmondstone, dead (folio 1554). Signature proved (folio 1554).

W. Stringham, dead (fol. 1553). Signature proved (fol. 1553).

J. Heffernan, dead (fol. 1557). Signature proved (fol. 1557).

J. Loughan, testified (fols. 1638–9, 1643–5).

P. Hennessey, convict (fols. 1551–2). Signature proved (fol. 1545).

J. Halligan, defendant on trial. Signature proved (fol. 1545).

[*W.*] *C. Miller*, testified (fols. 1676–9).

A. Alexander, whereabouts unascertainable (fols. 1717, 1557). Signature proved (fol. 1558).

D. Donahue, jr., testified (fols. 1704–5).

O. Jurgensen, testified (fols. 1619–20).

[And H. Jurgensen], testified (fols. 1626–30).

P. [*T.*] *Carey*, testified (fols. 1634–7).

Schenkl, testified (fols. 1655–62).

C. Oakley, testified (fols. 1646–1652).

P. [*T.*] *Hodgkinson*, testified (fols. 1631–1634).

T. Tully, said (fol. 1594). Did not act in any of the pink books proved (see columns 13 and 14 of Exhibit 56, pp. 1562–1564).

T. Radert, whereabouts unascertainable (fol. 1718). Did not act in any of the pink books proved. (See columns 13 and 14 of Exhibit 56, pp. 1562–1564.)

A. McNamee, whereabouts unascertainable (fols. 1559, 1718, 1832). Signature proved (fol. 1559).

This completed the entire list of the regular tallymen employed at any time within the period of any of these pink books.

(d) It appeared that in the usual course of business when a checker left his post for a few moments he was relieved by a temporary substitute sent as a rule from the dock office (folio 1593).

In the usual course of business these substitutes were other regular tallymen (folio 1561), in which event they were covered by the proof as to the above group.

Occasionally, however, the temporary substitutes would be samplers (folio 1516).

Therefore, out of an abundance of caution, the Government went to the extreme of proving a complete list of the samplers employed at any portion of any period covered by any of the pink books (folio 1565). (See the explanation offered to an objection to this line of proof, folios 1679–1680.) The proof from or as to each of these samplers was as follows:

A. Meyer, testified that he never acted (fol. 1707).

W. Schulde, testified (fols. 1683, 1692).

G. Gruber, testified that he never acted (fol. 1706).

J. Savage, testified that he never acted (fol. 1707).

G. [P.] Carey, testified (fols. 1669–76).

J. Hughes, dead (fol. 1566).

Lange, testified that he never acted (fol. 1708).

O. Biesandt, testified (fols. 1624–6).

J. O'Brien, dead (fol. 1566).

J. Mallon, too ill to testify (fol. 1893).

C. Fredericks, testified that he never acted (fol. 1709).

Anderson, testified that he never acted (fol. 1709).

O. Kroos, testified that he never acted (fol. 1710).

Smith (fol. 1566), whereabouts unascertainable (fol. 1718).

A. Saperton, testified that he never acted (fol. 1711).

A. Schultz, testified that he never acted (fol. 1712).

J. Wheaton, testified that he never acted (fol. 1713).

R. Hegan, dead (fol. 1566). Signature proved (fol. 1696).

L. Orr, testified (fol. 1714).

Bast, testified that he never acted (fol. 1715).

Tyler, whereabouts unascertainable (fol. 1718).

Frederick Altman, testified (fol. 1716).

The signatures were not proved because there were none (e. g., folio 1668), these reliefs being only for a few moments.

Most of these men, as will be noted, testified that they never acted as substitutes at all. All the others who were not incapacitated or dead or undiscoverable testified that whenever they substituted they wrote down correctly the weights recorded by the city weighers' scales.

(*e*) Falkenstein testified that as "an exception" and "very seldom" these temporary reliefs might have been sweepers (folios 1592–1593). Obviously these reliefs were negligible and could not have affected the substantial accuracy of the pink books and the pink book tables. Therefore the Government did not unearth and call the sweepers.

The foundation for this proof was, therefore, complete and first-hand and conclusive. (See opinion of

the Court of Appeals, at folios 4930–4968, and the charge of the trial judge that "the weight of this class of evidence depends upon its accuracy," folio 4010.)

Second. The pink books would have been sufficiently authenticated without all this complicated, difficult, and cumbersome proof of every figure they contained. It would have sufficed to prove the routine by which they were kept.

Where, as in this case, the routine by which the books were regularly kept was a routine founded upon direct personal knowledge of the truth of the items, and involved the action of a multitude of men, it is impracticable to require, as foundation for the admission of the books, proof direct that the routine was observed as to every figure they contained.

The regular course of business, the practical common sense of the situation, the established practice of business men, and the peremptory necessities of practical administration of justice, all preclude so extreme a requirement under such circumstances.

Miss. Logging Co. v. *Robeen*, 69 Fed., 773, 781, 782 (C. C. A. 8C).

Greene v. *U. S.*, 154 F. R., 401 (see p. 414 for facts); petition for certiorari denied, 207 U. S., 596.

Kerrch v. *U. S.*, 171 Fed., 366, 369.

Grunberg v. *U. S.*, 145 Fed., 81, 91.

Bacon v. *U. S.*, 97 Fed., 35, 40–41; petition for certiorari denied, 175 U. S., 175. (National bank books.) In the *Morse* case, on the trial a similar ruling was made and assigned as error, but was not specifically adverted to in

the affirming opinion by the Court of Appeals. *Morse* v. *U. S.*, 174 Fed., 539, 555.

See II Wigmore on Evidence, sec. 1521, pp. 1888–1889, and sec. 1530, at p. 1895–1896.

Continental Bank v. *National Bank*, 108 Tenn., 374.

FOURTH POINT.

THE ADMISSION ON THE MAIN TRIAL OF THE TESTIMONY OF SPITZER CONCERNING THE EARLY HISTORY OF THE CONSPIRACY WAS NOT ERROR.

The indictment does not charge, as stated (petitioner's brief, pp. 160, 161), that the conspiracies were "entered into" on March 1, 1907. It merely says that on that day the defendants "did unlawfully and willfully conspire" (pp. 19, 27). This is the conventional form for charging a conspiracy within the statute of limitations, and does not mean that the conspiracy did not preexist.

Standard Oil Co. v. *U. S.*, 221 U. S. 1.
Cf. *U. S.* v. *Kissel*, 218 U. S. 601.

The testimony of Spitzer, quoted as erroneously admitted, shows in fact that the conspiracy was in existence as far back as the Wilson Tariff Act of 1894 (Brief, pp. 161–162), and even that the frauds were going on when he went there "as a boy" in 1890 (fols. 1720, 1741, 1749, 1789).

As far back as 1897 Heike himself wrote to Gerbracht:

> As there were no duties paid on these sugars there could under no circumstances be any

harm in showing the weights, as there could be no comparison with customhouse weights. (Ex. 81, fol. 4748.)

In proving a continuous course of fraud or conspiracy it is proper and even necessary to go back to its very foundation. At all events, the range of time over which such evidence in any given case should extend is primarily one for the discretion of the trial court. The question is really foreclosed by—

Wood v. *U. S.*, 16 Pet., 342, 360–1.
Bottomly v. *U. S.*, 1 Story, 135.
U. S. v. *36 Barrels*, 7 Blatchf., 469, 473.
Standard Oil Co. v. *U. S.*, 221 U. S., 1, *supra*.
3 Greenleaf on Evidence, 16th ed., sec. 93.
State v. *Walker*, 98 Mo., 95.

Mr. Lehmann discusses the point at pages 2 and 3 of his brief on Gerbracht's petition for certiorari, No. 937, of October term, 1911.

CONCLUSION.

THE JUDGMENT SHOULD BE AFFIRMED.

January, 1913.

WINFRED T. DENISON,
Assistant Attorney General.

HENRY L. STIMSON.
FELIX FRANKFURTER.

APPENDIX.

The successive immunity provisions.

1. Section 860 of the Revised Statutes.[1]

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. *Provided*, That this section shall not exempt any party or witness from prosecution nor punishment for perjury committed in discovering or testifying as aforesaid.

---

[1] The immunity afforded by this section was not coextensive with the constitutional privilege against self-crimination and the provision therefore held unconstitutional in *Counselman v. Hitchcock*, 142 *U. S.* 547.

The section has since been repealed by the act of May 7, 1910, c. 216 ([1909–10], Stat. Part I, p. 352).

2. Act of February 11, 1893. (27 Stat., 443.)[1]

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to

[1] The constitutionality of this act was sustained in *Brown v. Walker*, 161 U. S., 591.

produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

3. Appropriation Act of February 25, 1903 (32 Stat., 903, 904).[1]

That for the enforcement of the provisions of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto, and of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the act entitled "An act to reduce taxation, to provide revenue for the Government, and other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said acts in the courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.[2]

---

[1] Applied and sustained in *Hale* v. *Henkel*, 201 U. S., 43.

[2] This act was carried down in the successive annual appropriation acts as follows: Act of Mar. 4, 1907 (34 Stat., 1359–1360); act of May 27, 1908 (35 Stat., 375); act of Mar. 4, 1909 (36 Stat., 1014).

4. AMENDATORY ACT OF JUNE 30, 1906 (34 STAT., 798).

Under the immunity provisions in the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath: *

O